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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1075.

ARTHUR JOHNSON, PETITIONER,

vs.

THE UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

PETITION FOR CERTIORARI FILED APRIL 8, 1912.
WRIT OF CERTIORARI GRANTED APRIL 22, 1912.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1911.

No. 1075.

ARTHUR JOHNSON, PETITIONER,

vs.

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ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

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1 In the Court of Appeals of the District of Columbia.

No. 2349.

ARTHUR JOHNSON, APPELLANT,
vs.
THE UNITED STATES.

Supreme Court of the District of Columbia. No. 27330, Criminal.

THE UNITED STATES
vs.
ARTHUR JOHNSON.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, That in the Supreme Court of the District of Columbia, at the city of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

Indictment.

Filed in open court March 2, 1911. J. R. Young, clerk.

In the Supreme Court of the District of Columbia, holding a criminal term.

January term, A. D. 1911.

DISTRICT OF COLUMBIA, *ss:*

The grand jurors of the United States of America, in and for the District of Columbia aforesaid, upon their oath do present:

That one Arthur Johnson, late of the District aforesaid, on the fifth day of December, in the year of our Lord one thousand nine hundred and ten, and at the District aforesaid, feloniously, wil'fully, purposely, and of his deliberate and premeditated malice, contriving and intending to kill one John Ofenstein, in and upon the said John Ofenstein, then and there being feloniously, wil'fully, purposely
2 and of his deliberate and premeditated malice, did make an assault; and the said Arthur Johnson, feloniously, wil'fully, purposely and of his deliberate and premeditated malice, so contriving and intending to kill the said John Ofenstein, with a certain piece of metal pipe in the hand of him the said Arthur Johnson then and there had and held, feloniously, wil'fully, purposely, and of his deliberate and premeditated malice, did strike and beat the said John Ofenstein in and upon the right side of the head of him, the said John

Ofenstein, and by such striking and beating of him, the said John Ofenstein, in manner and form aforesaid, did thereby then and there feloniously, wil'fully, purposely, and of his deliberate and premeditated malice, give to him, the said John Ofenstein, on mortal fracture, contusion and wound in and upon the said right side of the head of him the said John Ofenstein, of which said mortal fracture, contusion and wound he, the said John Ofenstein, from the said fifth day of December, in the year aforesaid, until the sixth day of December, in the year aforesaid, did languish, and languishing did live, on which said sixth day of December, in the year aforesaid, the said John Ofenstein, of the said mortal fracture, contusion and wound, did die.

And so the grand jurors aforesaid, upon their oath aforesaid, *so* say:

That he, the said Arthur Johnson, him, the said John Ofenstein, in manner and form aforesaid, feloniously, wil'fully, purposely and of his deliberate and premeditated malice, did kill and murder; against the form of the statute in such case made and provided, and against the peace and government of the said United States.

CLARENCE R. WILSON,
Attorney of the United States in and
for the District of Columbia.

(Endorsed:) Criminal No. 27330. United States vs Arthur Johnson. Murder in first degree. Witnesses, Dr. Charles S. Johnson, Dr. Walter Price, Hannah Newby, George A. Duehring, Clarence R. McClelland, Henry W. Fortney, M. P., George H. Ofenstein.

A true bill.

WM. H. MOSES, *Foreman.*

Arraignment.

Supreme Court of the District of Columbia.

FRIDAY, *March 10th, A. D. 1911.*

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United
3 States jail in and for the District of Columbia, and by his attorney T. M. Baker, Esquire; and, thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like.

MONDAY, *May 15th, A. D. 1911.*

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United States jail

in and for the District of Columbia, and by his attorneys, T. M. Baker and Joseph Salomon, Esquires; and thereupon, the said defendant being called for trial, it is ordered that a jury to try the issue joined herein be impanelled; whereupon the jurors of the regular petit jury panel, a list of whom was regularly served upon the said defendant, being called, sworn upon their voir dire, and examined as to their competency for trying the said issue, the said panel is exhausted by reason of challenges and excuses without the said jury having been completed; and thereupon, to complete the same, the clerk is ordered to draw from the jury box in his custody the names of seventy-five (75) other persons and the marshal is ordered to summon such persons to appear in this court to-morrow at 10 o'clock a. m.

TUESDAY, *May 16th, A. D. 1911.*

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come again the parties aforesaid, in manner as aforesaid, and the members of the petit jury who were on the jury panel at the time of the adjournment of the court yesterday; and thereupon the impanelling of the jury to try the issue joined herein is resumed; whereupon the marshal makes return into court of the names of the persons drawn yesterday by the clerk from the jury box in his custody pursuant to the order of this court to complete the said jury, with the date and manner of service endorsed thereon as follows, to wit:

* * * * * * *

who being called and those responding being sworn upon their voir dire and examined as to their competency generally for jury service and as to their qualifications for trying the issue joined in this case, the jury is completed, which is composed of good and lawful men of the District of Columbia, to wit:

1. David A. Wetzell.
2. Samuel L. Daw.
3. Edward Davis.
4. Louis Kramer.
5. John T. Clift.
6. Elmer H. Catlin.
7. John Tickell.
8. Sullivan J. Ross.
9. Edward Ebert.
10. Joseph Baruch.
11. Charles E. Davis.
12. William Freeman.

4 who are sworn well and truly to try the issue joined herein; and thereupon, after hearing the evidence in part, the said jury is respited until the meeting of the court to-morrow at 10 o'clock a. m.

Supreme Court of the District of Columbia.

WEDNESDAY, *May 17th, A. D. 1911.*

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come again the parties aforesaid, in manner as aforesaid, and the same jury that was respited yesterday; and thereupon, after hearing the evidence in full, the arguments of counsel, and the charge of the court, the said jury retire to consider of their verdict, and returning into court and being asked if they have agreed upon a verdict, upon their oath say that the said defendant is guilty of murder in the first (1st) degree in manner and form as charged in the indictment in this case; whereupon, on motion of the defendant, the said jury is polled and each member thereof upon his oath says that the said defendant is guilty of murder in the first (1st) degree in manner and form as charged in said indictment; and thereupon the said defendant is remanded to jail to await the further action of the court in this case.

Motion for new trial and in arrest of judgment.

Filed May 22, 1911.

In the Supreme Court of the District of Columbia.

* * * * * * *

Comes now Arthur Johnson, defendant herein, by his counsel, and moves the court for a new trial and in arrest of judgment for the following, among other grounds:

1. Because of evidence admitted which was inadmissible over objection and exception of defendant.

2. Because of excluded admissible evidence over objections and exceptions of defendant.

3. Because of errors of the trial judge in his rulings on the questions propounded on behalf of defendant to the jurors and talesmen for jurors, to which the defendant objected and excepted.

4. Because the trial court erred in refusing to instruct the jury to return a verdict for the defendant, as prayed, because that there was no evidence in the case that the alleged offense was committed in the District of Columbia.

5. Because the trial court erred in refusing prayers of defendant, to which exception was duly taken.

6. Because of the errors of the trial judge in his rulings on the law and the evidence, to which exceptions were duly taken.

7. Because the defendant was not arraigned.

5 8. Because the indictment was never read to the defendant.

9. Because there was no issue herein to be tried, and none was tried.

THOMAS M. BAKER,
Attorney for Defendant.

Hereto attached and made a part hereof in support of this motion is the affidavit of Thomas M. Baker, counsel for defendant.

Thomas M. Baker, on oath, says as follows:

I am counsel for above named defendant, Arthur Johnson, and was present in the court when he was called for arraignment, and

heard and saw and know what took place. Said defendant was asked by the clerk if his name was Arthur Johnson, and affirmative reply was made by said defendant. He was then asked by the clerk if he waived the reading of the indictment, and he replied that he did.

He was then asked by the clerk if he wished to plead guilty or not guilty, and he pleaded not guilty. There is no record of anything other or further being done as to arraignment of defendant. Affiant says, therefore, that said defendant was never arrigned, and for the reason that a defendant in a capital case has no power or right to waive reading of the indictment to him. The record of the so called arraignment of defendant does not show that the indictment was read to him, but recites that he was arraigned, which is a conclusion of law and is not a fact, for the reason that a defendant is not arraigned when he waives reading of the indictment. There being no legal or other arraignment of defendant, there was no issue herein to be tried and none was tried.

THOMAS M. BAKER.

Signed and sworn to before me at Washington, D. C., May 22nd, A. D. 1911.

[SEAL.]

SAM'L C. HILL,
Notary Public, D. C.

Supreme Court of the District of Columbia.

FRIDAY, *June 2d, A. D. 1911.*

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United States Jail in and for the District of Columbia, and by his attorneys, T. M. Baker and Joseph Salomon, Esquires; and thereupon the motion for a new trial and the motion in arrest of judgment filed herein by the defendant being heard, it is considered by the court that the said motions be, and they hereby are, overruled: whereupon the attorney of the United States moves the court to pronounce the

6 sentence of the law in this case, and it is demanded of the defendant what further he has to say why the sentence of the law should not be pronounced against him, and he says nothing except as he has already said; and thereupon it is considered by the court that for his said offense the said defendant be taken by the warden aforesaid to said jail whence he came, and there be kept in close confinement, and that on Monday, the thirty-first day of July, A. D. 1911, he be taken to the place prepared for his execution within the walls of the said jail and then and there, between the hours of sunrise and nine (9) o'clock ante-meridan of the same day, he, the said defendant, be hanged by the neck until he is dead; and may God

have mercy on his soul; whereupon the attorneys for the defendant note an appeal to the Court of Appeals of the District of Columbia from the judgment of the court in this case; and thereupon the attorney of the United States in open court waives the issuance of a writ of citation.

Supreme Court of the District of Columbia.

WEDNESDAY, *June 14th*, A. D. 1911.

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon consideration of the motion filed herein by the defendant in that behalf, it is ordered by the court that said defendant be not required to furnish a bond for costs on the appeal taken herein, and that the clerk of this court prepare a transcript of the record without cost to said defendant.

TUESDAY, *July 18th*, A. D. 1911.

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Upon motion of the attorney for the defendant, it is ordered by the court that the time for filing the transcript of record of this case in the Court of Appeals be, and is, extended to and including September 1st, 1911.

WEDNESDAY, *July 19th*, A. D. 1911.

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come as well the attorney of the United States as the defendant, in proper person, in custody of the superintendent of the Washington Asylum and Jail and by his attorney T. M. Baker, Esquire; and thereupon it appearing to the court that the time within which the defendant has under the rule of court to perfect the appeal

7 pending herein will not have expired before the day set for the execution of said defendant, it is considered by the court that the execution of the sentence of death pronounced in this case upon said defendant June 2nd, A. D. 1911, to be executed on Monday, July 31st, A. D. 1911, between the hours of sunrise and nine (9) o'clock ante meridian of the same day, be, and the said execution of the said sentence hereby is, stayed and postponed, to be had and carried into effect on Monday, November 20th, A. D. 1911, between the hours of sunrise and nine (9) o'clock ante meridian of the said Monday, November 20th, A. D. 1911.

WEDNESDAY, *July 26th*, A. D. 1911.

The court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * * * *

Come as well the attorney of the United States, as the defendant by his attorney, T. M. Baker, esquire; whereupon the defendant by his attorney prays the court to sign and make a part of the record his bill of exceptions in this case, heretofore submitted on June 21st, 1911, which is accordingly done.

Bill of exceptions.

Filed July 26, 1911.

In the Supreme Court of the District of Columbia.

* * * * * * *

Be it remembered that the above-entitled cause came on for trial May 15, 1911, before Mr. Justice Wright and a jury. The United States was represented by Mr. Assistant United States Attorney Charles H. Turner, and the defendant by Mr. Joseph Salomon and Mr. Thomas M. Baker.

Thereupon the regular jurors then serving in that court for that term being examined under oath on their voir dire, such a number were challenged for cause and peremptorily that there were less than twelve remaining, and thereupon talesmen were drawn to complete a jury herein, and in examination of one of such talesmen he was interrogated as follows:

"Mr. SALOMON. If your honor please, on yesterday I propounded a question to one of the talesmen under section 330 of the Penal Code, and I desire to frame the question a little differently, and I would like to ask this talesmen that question.

"By Mr. SALOMON:

"Q. Mr. Clift, do not answer this question until Mr. Turner has an opportunity to object to it; Mr. Clift, if you should be sworn as a juror in this case and after hearing all the evidence would find that the defendant is guilty of murder in the first degree, and if the court instructed you that, under the laws of the District of Colum-
8 bia, you could add the words 'without capital punishment,' would you add those words if, on the whole evidence, you believed it would be not just or wise to impose the death penalty?

"Mr. TURNER. I object to that as not stating the law.

"The COURT. Objection sustained.

"Mr. SALOMON. The purpose of asking this question is that the claim is made and will be made by the defendant that section 330 of the Code of Criminal Procedure, approved March 4, 1909, which went into effect the first of January, 1910, is applicable to the District of Columbia, the purpose of asking this question being to test the mind of the juror on the question of a qualifying verdict. Your honor sustains the objection?

"The COURT. Yes.

"Mr. SALOMON. We note an exception."

This man served on the jury which tried this case, and defendant exhausted all his *preemptory* challenges.

The evidence for the United States tended to show:

That the defendant killed John Ofenstein, in the District of Columbia, on the day on which the indictment charged that offense against him, by striking Ofenstein on the head with a heavy iron rod, and there was evidence tending to show that the act was done purposely, and with premeditation and deliberation.

That on said day, or immediately prior, there existed such a condition of weather and of the streets that defendant, who was a driver of draft horses on said streets, had come to the blacksmith shop were said Oftenstein was for the purpose of having one or more of the horses or mules which were driven by the defendant shod at said shop.

That defendant was at the shop earlier in the day and left and returned there, seemed to think he had been deprived of his order of precedence in having the animals shod which he had taken there for that purpose, and he attempted to force one of them past others, and said Ofenstein asked him not to do that and took hold of the bridle of the animal and backed him a short distance and told defendant he must wait his turn.

According to the testimony of certain witnesses defendant at the time was under the influence of intoxicating drink and he resented the interference of said Ofenstein and threatened him and went away a short distance and took in hand a heavy iron rod and returned and against the remonstrances of bystanders struck the said Ofenstein on the head and said blow caused his death.

The evidence for the defendant tended to show:

That defendant on the same day and shortly before committing the acts charged in the indictment had been drinking intoxicating liquors.

The defendant did not testify in his own behalf.

The foregoing is the substance of all the testimony in this case.

The defendant's prayers for instructions, except numbers 4 and 5, which were withdrawn, as given and refused, with exceptions noted, are as follows:

9 *Defendant's prayers.*

1. The jury are instructed, as matter of law, that before they can convict the defendant of either first or second degree murder they must find that all the elements necessary to constitute that degree are established by the evidence beyond a reasonable doubt. (Given. W.)

2. If the jury find from the evidence that the defendant purposely killed the deceased, they are instructed as matter of law that they cannot convict the defendant of murder in the first degree, unless they further find from the evidence that before committing the assault which caused the death of the deceased, the defendant had in his mind a fixed purpose to kill the deceased, and that sufficient time

elapsed between the forming of the purpose and the committing of the act to enable the defendant to deliberate and premeditate upon such purpose, and that in fact he did so deliberate and premeditate. (Refused, because a technical assault may so far antecede the blow, as to permit the intermediate formation of a deliberate and premeditated purpose to kill. Exception. W.)

3. The jury are instructed as matter of law that if the defendant committed the assault which caused the death of the deceased as the result of and during a sudden passion which he was unable to control, and which passion was engendered by a quarrel the defendant then and there had with the deceased, the defendant cannot be convicted of any higher degree of homicide than manslaughter. (Refused and exception. W.)

6. The jury are instructed that if they fixed from the evidence that at the time the defendant committed the assault he was so far under the influence of liquor and intoxicants as to be unable to deliberate and premeditate he cannot be convicted of murder in the first degree. (Given. W.)

7. The jury are instructed that if under the law and evidence in this case they find the defendant guilty as indicted, they may add to their verdict the words "without capital punishment," if upon a view of the whole evidence the jury are of the opinion that it would not be just or wise to impose the death penalty. (Refused and exception. W.)

8. The jury are instructed on the whole evidence in this case to return a verdict of "not guilty." (Refused and exception. W.)

9. The jury are instructed as matter of law that if the defendant committed the assault which caused the death of the deceased as the result of and during a sudden passion which he was unable to control, and which passion was engendered by a quarrel the defendant there and then had with the deceased, the defendant cannot be convicted of any higher degree of homicide than murder in the second degree. (Refused because there is no evidence which tends to prove that there was "a quarrel." And exception. W.)

The trial justice then charged the jury as follows:

10 *Charge to the jury.*

"The COURT: Gentlemen of the jury, there are three grades or degrees of unlawful homicide: murder in the first degree, murder in the second degree, and manslaughter. Manslaughter at least is committed by one who through an unlawful act occasions the death of another, utterly independent of the question whether he intended to produce death: so that, if you find in this case that the defendant through an unlawful act occasioned the death of Mr. Ofenstein, he would be guilty of at least manslaughter. Now, to strike one with a bar, or with anything else, as tended to be established by the evidence in this case, is an unlawful act. Whether the defendant is guilty—if guilty of anything at all—of a greater offense than man-

slaughter, depends on the difference that exists between murder in the second degree, which is the offense next higher in gravity than manslaughter, and manslaughter. The only difference between murder in the second degree and manslaughter is in the state of mind that possesses the individual at the time he performs the unlawful act which results in the death of the other; that state of mind which the law characterizes by the use of the word 'malice.' In ordinary parlance we are accustomed to use the word 'malice,' when we talk with one another, as indicative of some kind of personal hostility against another; as showing some kind of vengeance or retribution against another. Now, that is not the only significance that the law intends by the use of the word 'malice.' The law intends by the use of the word 'malice,' to describe the state of mind that a man is in when he does an unlawful act with a wilful and wanton disregard of the rights of the person against whom he does it. It is not necessary that he shall have any vindictiveness against him; it is not necessary that he shall have any hostility against him personally in order to constitute a malicious state of mind. As I have said to other juries in the way of illustration, take the instance of the school boy passing along the roadway on his way home from school before a vacant and untenanted house; he does not know who the owner is and hadn't anything against him; he takes up a missile and without reason hurls it through the window. You see that manifests in his mind the wilful and wanton disregard of the rights of the owner. Now, that is the exact and only significance that the law recognizes in the use of the term 'malice'; the state of mind a man is in when he does an unlawful act, which is a wilful and wanton and disregard of the rights against the person whom he does act. Therefore, if you find this defendant unlawfully struck a blow which occasioned the death of Ofenstein, as I have said, he would be guilty of at least manslaughter. Whether he would be guilty of the offense of murder in the second degree would depend entirely on the consideration, whether at the time he struck the unlawful blow, he had in his mind a wilful and wanton disregard of Ofenstein's rights. That is all that is necessary to make it murder in the second degree as distinguished from manslaughter. It is not necessary to the guilt in case of second degree that he shall have intended to kill Ofenstein; it is only
11 necessary that at the time of the striking of a blow which resulted in Ofenstein's death, the defendant shall have had a wilful and wanton disregard of Ofenstein's rights.

"Whether if guilty, he is guilty of any more than murder in the second degree depends upon the difference that there is between murder in the second degree and murder in the first degree. Nobody can be guilty of murder in the first degree unless at the time of the performance of the unlawful act which results in the death of the other, his mind is in the malicious state, which I have already described; that is to say, he does the act with a wilful and wanton disregard of the rights of the other; but in addition to that, he must actually have in his mind a purpose to kill the other, and more than

that, that purpose must be a deliberate and premeditated purpose to kill. Now you must know and understand clearly what the law means by that expression 'deliberate and premeditated, malicious purpose to kill.' The law intends by that phrase to draw the distinction between the performance of an intended act, with determined purpose, that is executed at first hand, and the execution of a distinctly priorly conceived purpose. Now therefore, before you can find that this defendant is guilty of murder in the first degree you would have to find that he intended to kill Ofenstein at the time he struck the blow, and you would have to find that he made up his mind maliciously to kill Ofenstein, and that when he did strike the blow which resulted in the death of Ofenstein, he did it at a time so post-dating the moment at which he made up his mind to kill, that when he executed the blow he did it, not as the result of a purpose formed at the moment, but as the result of a distinctly preconceived purpose to kill; so that when he did perform the act which resulted in death, he did it as the result of a distinctly preconceived determination to kill Ofenstein.

"That brings you back for a moment to the consideration that a man may be guilty of no more than murder in the second degree although he intended to kill the other. If he intends to kill at the time he strikes the blow which produces death, but at the time, although he does intend to kill, he strikes the blow without premeditating or deliberating upon the purpose to kill, then he would be guilty of only murder in the second degree. But if at the time of the killing—I should say, if at the time of striking the blow which resulted in death, he at that moment intended to kill by the blow, then he would not be guilty of murder in the first degree unless the purpose to kill had existed in his mind so long before the act of striking, as that when he did strike intending to kill, he did it as the result of a distinctly preconceived purpose to kill; and the question of time, the question of how long, if at all, he entertained the purpose to kill, if of but secondary importance; whether the time be long or short it is necessary to the proof of premeditation and deliberation that the act and purpose to kill shall have been executed as the result of a distinctly preconceived purpose, no matter how long or how short the time was between the time of the original making up of the purpose and its deliberate execution.

"With respect to a suggestion from both the evidence and
12 the argument of counsel that the defendant was drunk, it is important that you should understand the significance of that evidence and its appropriate application. Voluntary drunkenness is in itself no excuse at all for the commission of a crime; sometimes it is an aggravation instead of a palliation. A moment's reflection will enable you to understand what importance, if any, a claim of drunkenness ought to have in a criminal case. Where you have a mental state as one of the elements essential to guilt of crime, then it is important and it is necessary for you to determine what the mental state of the individual was. If you should find in a particular case

that a man was so drunk that his drunken condition for the moment unseated the equilibrium of his intellectual faculties, so that you find that because of the drunkenness he could not form a purpose, or was so drunk he could not go through with the intellectual process of reasoning, premeditating and deliberating, there you would have a case where drunkenness had proceeded to such a degree as to prove that essential elements in so far as mental state was concerned, were absent from the defendant. Now that is the significance of the claim of drunkenness in this case; that you should look into the evidence and see how far, if at all, this man was drunk. If you find that although partially under the influence of liquor, yet the drunkenness had not proceeded to a degree which rendered him mentally incapable of forming a purpose to kill, and had not proceeded to such a degree as rendered him mentally incapable to premeditate and deliberate over the formed purpose, no matter how drunk he was, if he yet retained the mental capacity to form a purpose to kill, then he is responsible for the formation of that purpose; and if he yet maintained a mental capacity to reflect, premeditate and deliberate over a fixed purpose to kill and to execute it, so that when he did execute it he executed it as the result of a definitely preconceived design, then he is guilty of murder in the first degree, no matter to what degree the drunkenness may have been present in his condition. If on the other hand the drunkenness had proceeded to such a degree as that he could not entertain either the purpose nor could he have deliberated, in that aspect of your findings, if you should so find, he could not be convicted of any offense which contained those certain elements which you find did not exist in his case because of his drunkenness.

"The law requires before a defendant charged with homicide can be announced guilty by a jury, that the proof shall satisfy the jury of his guilt beyond a reasonable doubt; that phrase is not to be regarded by the jury as a blanket by which a juryman can shield himself from the discharge of an unpleasant duty, if that duty is made clear to him by the evidence. It means that no influence and no consideration shall swerve the jury one way or the other in the case, whether it be a consideration of influence, sympathy or anything else, except what the jury hears as evidence from the witness stand in the court room. If, after a full, fair and honest consideration of all the evidence in the case a jury is satisfied of the defendant's guilt, it is their duty to say so; but if upon an equally fair, candid and
13 frank consideration of all the evidence in the case, a jury finds that there are only strong suspicions of guilt, the only safe course is to acquit.

"In as much as the mental state of the defendant is essential to be looked at, inquired into, and determined by you upon the point of a purpose to kill, and whether or not that purpose, if existing, was executed as the result of premeditation and deliberation, you have to ascertain as far as the evidence enables you the state of the defendant's mind at the time of the performance of the act which it is claimed resulted in the death of Ofenstein. In as much as mental

states are unphysical, cannot be seen and are not capable of physical demonstration, the only way that affords an avenue into the mind of another is by the scrutiny of voluntary conscious acts that he performs, with a view to ascertaining what state of mind must have existed as prompting the acts in question. Therefore the law, based upon the observation of human experience, has adopted this rule: That where one is found doing an act against another, of such nature that it ordinarily results in the death of the other, that the jury is warranted, if they see fit, in presuming that he intended the result which usually follows the act that he adopted. Therefore you ought to look at the nature of this act in question, consider the nature of the instrument used against Ofenstein, consider the part of the body against which the blow was directed, all with a view to making up your minds whether or not the nature of the instrument, the manner in which it was secured and used, and the blow on his body was such, as that one who voluntarily does that kind of thing generally intends the result of his act; and if you do so find, then you are justified in saying that this defendant intended the usual and ordinary result of the act that he committed; and if you find that the usual and ordinary result of such an act would be the death of the one against whom the blow was directed, you would be authorized to conclude that the defendant intended the death of Ofenstein in this particular case, that he intended to kill him. That is not a conclusion which you have to reach, but it is one that you are justified in reaching. I think of nothing else that can aid you in your deliberations. Is there anything you desire to suggest?

"Mr. TURNER. Shouldn't your Honor tell them the form of the verdict?

"The COURT. Yes. If you find the defendant is guilty of murder in the first degree, return your verdict, guilty as indicted. If you find him not guilty of murder in the first degree, but guilty of murder in the second degree, then your verdict should be not guilty of murder in the first degree but guilty of murder in the second degree. If you should find him guilty of manslaughter, but not guilty of murder in the first or second degree, then return your verdict, not guilty of murder, but of manslaughter. If you find that he did not perform any unlawful act at all, return him not guilty. You may retire."

All the foregoing exceptions were taken during said trial, as appears by the foregoing, and were duly noted at the time taken and before the jury retired to consider its verdict.

14 Defendant, by his counsel, now asks that this bill of exceptions be signed by the trial justice to have the same force and effect in all respects as if each bill of exceptions had been separately so signed at the time taken, and accordingly this bill of exceptions is signed and filed and made a part of the record in this cause, this 26th day of July, A. D. 1911, now for then.

DAN THEW WRIGHT, *Justice*.

(Endorsed:) Handed to me June 21, '11.—Wright.

Designation for transcript on appeal.

Filed August 5, 1911.

In the Supreme Court of the District of Columbia.

* * * * * * *

1. Indictment.
2. Minutes of arraignment.
   Empanelment of jury.
3. Verdict of jury.
4. Motion for a new trial and in arrest of judgment, affidavit supporting same, order overruling same, exceptions to the order.
5. Sentence.
6. Minutes of exception and appeal.
7. Order granting leave to prosecute appeal without giving bond and allowing transcript without paying for same.
8. Bill of exceptions.
9. Minute showing filing, signing, etc., of bill of exceptions.
10. Notice to United States attorney, D. C., of filing of bill of exceptions with the clerk of the court.
11. Order extending time to file transcript in the court of appeals.
12. Order staying execution until November 20, 1911.
13. This designation.

AUGUST 5, 1911.

Clerk of the Supreme Court of the District of Columbia:

Please furnish transcript of record on appeal in the case of Arthur Johnson, criminal, No. 27330, in accordance with the foregoing designation.

THOMAS M. BAKER.
Attorney for Defendant.

Please make complete record of whole case.

J. M. PROCTOR.
Ass't U. S. Att'y.

Memorandum.

August 25, 1911.—Time to file transcript of record further extended to and including October 4, 1911.

15 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 26, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, a copy of which is made part of this transcript, in cause No. 27330 Criminal, entitled The

United States vs. Arthur Johnson, as the same remains upon the files and of record in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said court, at the city of Washington, in said District, this 10th day of September, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

(Endorsed on cover:) District of Columbia Supreme Court. No. 2349. Arthur Johnson, appellant, vs. The United States. Court of Appeals, District of Columbia. Filed Oct. 2, 1911. Henry W. Hodges, clerk.

16 MONDAY, *October 2nd, A. D. 1911.*

ARTHUR JOHNSON, APPELLANT,
vs.
THE UNITED STATES. } No. 2349.

On consideration of the appellant's motion in the above-entitled cause, submitted to the court by Mr. Thomas M. Baker, to file the record and proceed in forma pauperis in this court, it is ordered by the court that said motion be, and the same is hereby, granted.

17 MONDAY, *February 5th, A. D. 1912.*

ARTHUR JOHNSON, APPELLANT,
vs.
THE UNITED STATES. } No. 2349.

On motion, Mr. D. W. Baker is allowed fifteen minutes in the argument of this cause as amicus curiæ.

The argument in the above-entitled cause was commenced by Mr. Jos. Salomon, attorney for the appellant, and was continued by Mr. J. M. Proctor, attorney for the appellee, and by Mr. D. W. Baker, as amicus curiæ, and by Mr. C. R. Wilson, attorney for the appellee, and was concluded by Mr. Thomas M. Baker, attorney for the appellant.

18 In the Court of Appeals of the District of Columbia.

ARTHUR JOHNSON, APPELLANT,
vs.
THE UNITED STATES. } No. 2349.

Opinion.

(Mr. Justice Robb delivered the opinion of the court.)

Appeal by a defendant convicted in the Supreme Court of the District of murder in the first degree and sentenced to death. The evi-

dence for the United States tended to show, to quote from the record, "that the defendant killed John Ofenstein, in the District of Columbia, on the day on which the indictment charged that offense against him, by striking Ofenstein on the head with a heavy iron rod, and there was evidence tending to show that the act was done purposely, and with premeditation and deliberation." The evidence for the defendant tended to show that at the time of the commission of the acts charged in the indictment he "had been drinking intoxicating liquors." Two questions only are presented for review.

1. It is contended that there should have been an arrest of judgment because, as the defendant insists, the indictment was not read to him. Upon this branch of the case the recital in the record is as follows: "Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United States jail in and for the District of Columbia, and by his attorney, T. M. Baker, esquire; and thereupon, the defendant being arraigned upon the indictment, pleads thereto not guilty and for trial
19 puts himself upon the country, and the attorney of the United States doth the like. In support of the motion for a new trial and in arrest of judgment, counsel for the defendant made and filed an affidavit, which is in the record, in which it is stated that when the defendant was called for arraignment he was asked if his name was Arthur Johnson, and upon his affirmative answer, "was then asked by the clerk if he waived the reading of the indictment, and he replied that he did." The affidavit further states that the defendant was then asked by the clerk if he wished to plead guilty or not guilty, and that he replied not guilty.

The term "arraignment" has a well-defined signification. Strictly speaking, the defendant is arraigned by being called to the bar of the court to answer the accusation contained in the indictment, the arraignment consisting of three parts: (1) Calling the defendant by name and commanding him to hold up his hand that his identification may be certain; (2) reading to him the indictment; and (3) taking his plea. (4 Bl. Com., 322; Harg. St. Tr., 4 vol., 777; 2 Hale, 219; 1 Chit. Cr. Law, 414; Crain vs. United States, 162 U. S., 625, 637.) The object of an arraignment is the identification of the accused and the framing of an issue upon which he may be tried. According to the criminal code of Indiana "the defendant is arraigned by reading to him the indictment and requiring him to plead thereto." In Clare vs. State (68 Ind., 17) it was held that the recital in the record that the defendant "being arraigned and required to plead," etc., necessarily implied the reading of the indictment. A similar ruling was made in State vs. Weeden (133 Mo., 70). See also Powers vs. United States, recently decided in the Supreme Court of the United States.

20 The recital in the record in the case at bar that "the defendant, being arraigned upon the indictment, pleads thereto," coming to us with the sanction and approval of the trial court, must necessarily be understood to mean that all the steps essential

to a proper arraignment were taken. And the verity of the record may not be impeached in the manner attempted. To permit it to be thus contradicted would overturn well-established rules of procedure and lead to much confusion. "The record imports absolute verity; an affidavit of a witness does not; and when the court, which in addition may be supposed to have personal knowledge of the fact, sustain the recital in the record as against the statement in the affidavit, its ruling can not on review be adjudged erroneous." (Evans vs. Stettnich, 149 U. S., 605; Hudgins vs. Kemp, 18 How., 530.)

It is therefore unnecessary in the present case to determine whether the defendant in a capital case may waive the reading of the indictment. In the Crane case (162 U. S., 625) the conviction was set aside because it did not affirmatively appear that the defendant ever pleaded to the indictment, the ground of the ruling being that until such a plea was entered there was no issue to be tried. The question attempted to be raised in the case at bar was not passed upon.

2. The more serious question is presented whether a jury in the District of Columbia may qualify a verdict of murder in the first degree by adding thereto "without capital punishment." The court was requested to instruct the jury that it might so qualify its verdict. The ruling was against the defendant, and an exception was noted.

21 Under sec. 5339 of the Revised Statutes of the United States every person who committed murder was punishable by death. Under sec. 5345 of the same statutes the same punishment was prescribed for the crime of rape. These statutes continued in full force until, on Jan. 15, 1897, Congress provided that a verdict of guilty of murder or of rape under the two named sections might be qualified by the addition of the words "without capital punishment," in which event the convicted person should be sentenced to imprisonment at hard labor for life. (29 Stat., 487.) It will be observed that more than one degree of murder had not been established at that time. Said sections 5339 and 5345 having been applicable "within any fort, arsenal, dockyard, magazine, or any other place or district of country under the exclusive jurisdiction of the United States," were necessarily in force in this jurisdiction, as was said act of Jan. 15, 1897. (Strather vs. United States, 13 App. D. C., 132; Winston vs. United States, 172 U. S., 303.)

Under the act of June 4, 1897 (30 Stat., 58), provision was made for the appointment of a commission to revise and codify the criminal and penal laws of the United States. The duties of this commission were further enlarged by the act of March 3, 1899 (30 Stat., 643), and the act of March 3, 1901 (31 Stat., 1181). Under the last-named act it was made the duty of the commission to include in its revision and codification "all laws of the United States of a permanent and general nature in force at the time the same shall be reported."

On March 3, 1901, which, it will be noted, was the very day upon which the codification commission was authorized to include in its revision all laws of the United States of a permanent and
22 general nature, "An act to establish a code of law for the District of Columbia," was approved (31 Stat., 1189). According to House Report No. 1017, 56th Cong., 1st session, that code was the culmination of sixty years of effort by the people of this District to have Congress adopt a code of the general and permanent statutes affecting local, personal, and property rights. It was intended to be, and is in fact, a very comprehensive body of local law, containing sixty chapters, embracing 1,642 sections. Various amendments have from time to time been adopted by Congress. Under sec. 1 of the code it was provided that "all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act, shall remain in force, except in so far as the same are inconsistent with, or are replaced by, some provision of this code." Sec. 1640 provided that nothing in the repealing clause should be held to affect the operation or enforcement in this District "of any general statute of the United States not locally inapplicable in the District of Columbia or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States * * * except in so far as the same may be inconsistent with, or is replaced by, some provision of this code."

Sec. 798, subchapter 1 of chapter 19, dealing with "Crimes and punishments," defines murder in the first degree as follows: "Whoever, being of sound memory and discretion, purposely and either of deliberate and premeditated malice or by means of poison, or
23 in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree." The first part of this definition is substantially that given by Coke (3 Inst., 47) and adopted by Blackstone (4 Com., 195) and Chitty (2 Cr. Law, 724). Sec. 799 makes the placing of an obstruction on a railroad, under certain conditions and where death ensues, murder in the first degree. Sec. 800 prescribes that "whoever with malice aforethought, except as provided in the last two sections, kills another is guilty of murder in the second degree." Thus it came to pass that Congress for the first time established two degrees of murder in this jurisdiction. Sec. 801 ordains that the punishment for murder in the first degree shall be death by hanging; for murder in the second degree, imprisonment for life or not less than twenty years. Sec. 808 prescribes the punishment for rape as not less than five nor more than thirty years. The section further provides, however, "that in any case of rape the jury may add to their verdict, if it be guilty, the words 'with the death penalty,' in which case the punishment shall be death by hanging."

We think it plain that by the enactment of the District Code Congress intended to replace and supersede all general statutes of the United States dealing with the same subject matter. To be still more specific, we think that when Congress established two degrees of murder, defined the punishment for each and prescribed the punishment for rape, it intended that those provisions should replace and supersede the general statutes of the United States dealing with those offenses. Substantially the same result was achieved by the
24 establishment of two degrees of murder, as was effected by said act of Jan. 15, 1897, permitting a jury to qualify its verdict; in other words, where, upon consideration of all the facts and circumstances developed by the evidence, the jury would not be convinced that murder in the first degree, as defined by the statute and explained by the court, had been shown, might return a verdict of murder in the second degree. (Hopt vs. People, 104 U. S., 631; 110 U. S., 582.) In the Winston case (172 U. S., 303–310) the court said: "The hardship of punishing with death every crime coming within the definition of murder at common law, and the reluctance of jurors to concur in a *capital* conviction, have induced American legislatures in modern times to allow some cases of murder to be punished by imprisonment instead of by death." The court further observed that this result has usually been attained in one of two ways: First, by statutes establishing degrees of murder and providing for the death penalty in those cases only in which the verdict is murder in the first degree; and, second, statutes "conferring upon the jury in every case of murder the right to decide whether it shall be punished by death or by imprisonment."

A further reason for holding that the provisions of the code relating to murder and rape were intended to supersede the provisions of the general statutes relating to those crimes is found in the fact that under the general statutes rape was primarily punishable by death, the jury, as we have seen, having the right to qualify its verdict, in event of which the punishment was imprisonment for life. Under the code the punishment for rape primarily was not less than five nor more than thirty years imprisonment, the jury having the right
25 to add to its verdict the words "with the death penalty."

A careful study of the District code irresistibly leads to the conclusion that Congress in its enactment stepped aside from its revision and codification of the general laws of the United States, and in its capacity as a national legislature for this municipality (Daly *vs.* Macfarland, 28 App. D. C., 552–58) revised and brought together statutes supposedly applicable to conditions here existing. The main object in thus bringing together these local statutes was to do away with ambiguity and provide for the people of the capital city a compact code of law. Congress, of course, realized that conditions obtaining in this comparatively large city might in many respects differ from conditions obtaining in other parts of the country under the exclusive jurisdiction of the United States. It also apparently fully appreciated the wisdom and necessity of providing such a consider-

able number of people—approximately as many as are found in some of the States—with a concise body of law for their government rather than to leave them to the mazes of the general statutes of the United States.

By the act of June 30, 1906 (34 Stat., 754), the Commission for the Revision and Codification of the Laws of the United States was directed to make its final report to Congress in December ensuing. This report resulted, on March 2, 1907, in the appointment of a joint special committee of the Senate and House to submit to Congress recommendations upon such revision and codification. This committee first considered and reported an "Act to codify, revise, and amend the penal laws of the United States," which, after amendment,
26 was adopted on March 4, 1909 (35 Stat., 1088). Chapter 1 comprises offenses against the existence of the Government; chapter 2, offenses against neutrality; chapter 3, offenses against the elective franchise and civil rights of citizens; chapter 4, offenses against the operation of government; chapter 5, offenses relating to official duties of Federal officers, clerks, agents, employees, etc.; chapter 6, offenses against public justice; chapter 7, offenses against the currency, coinage, etc.; chapter 8, offenses against the Postal Service; chapter 9, offenses against foreign and interstate commerce; chapter 10, the slave trade and peonage. It is plain that these ten chapters deal with general statutes of the United States and not with statutes of a local character.

Chapter 11 of this criminal code of the United States deals with offenses within the admiralty, maritime, and territorial jurisdiction of the United States, sec. 272 of this chapter providing that the crimes and offenses defined in the chapter shall be punishable as therein prescribed: First, when committed upon the high seas, etc.; second, when committed upon any vessel registered, licensed, or enrolled under the laws of the United States, etc.; third, "when committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." Sec. 273 defines murder as the unlawful
27 killing of a human being with malice aforethought. The section also defines murder in the first degree and ordains that any other murder is murder in the second degree. Sec. 275 prescribes the death penalty for murder in the first degree, and for murder in the second degree imprisonment for not less than ten years or for life. Sec. 278 prescribes the death penalty for rape.

Chapter 12 deals with piracy and other offenses upon the seas. Chapter 13 treats of "Certain offenses in the Territories," sec. 311 of this chapter prescribing that "except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or district, or within or upon any place within the exclusive jurisdicton of the

United States." Sec. 312 of this chapter relates to the circulation of obscene literature and the promotion of abortions, sec. 313 to polygamy, sec. 314 to unlawful cohabitation, sec. 316 to adultery, sec. 317 to incest, and sec. 318 to fornication. Sec. 319 penalizes the failure to regard certificates of marriage, and is in terms made applicable only to the "Territories of the United States." Sections 320 and 321, relating to prize fights and bull fights, are in terms restricted in their application to the Territories of the United States and the District of Columbia. Sec. 322, which is the last section of the chapter, relates to train robberies. Chapter 14 embraces "General and special provisions." Sec. 339 of that chapter, however, expressly ordains that the "arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, and therefore no interference
28 or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed." Sec. 323 of this chapter prescribes that the manner of inflicting the punishment of death shall be by hanging. Sec. 330, which is a mere reenactment of sec. 1 of said act of Jan. 15, 1897, provides that "in all cases where the accused is found guilty of the crime of murder in the first degree or rape the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment for life." Sec. 331 permits the court, in its discretion, to add to the judgment of death that the body of the offender be delivered to a surgeon for dissection, whereupon "the marshal who executes such judgment shall deliver the body," etc.

It is contended that chapter 11 of the Federal criminal code, as well as chapter 14, are in force in the District of Columbia, and hence that the provisions in these chapters relating to the crime of murder have, by implication, repealed and superseded corresponding provisions in the local code. There are many reasons for believing that this contention is not sustainable. We will first look to the letter of the statute. The Revised Statutes relating to murder, as we have seen, embraced forts, arsenals, dock-yards, magazines, and other places or districts of country "under the exclusive jurisdiction of the United States." This language was sufficiently comprehensive to include, and did include, the District of Columbia; but, as previously noted, while the revision and codification of the Federal criminal laws was in progress the District of Columbia was given a
29 local code of law, which necessarily superseded general statutes then in force. When, therefore, the Federal code was enacted the comprehensive jurisdictional language of sec. 5339 of the Revised Statutes gave way to what we conceive to be more restrictive language. The various ways in which the United States might acquire land was well known to Congress. It was equally well known that there are scattered over the United States tracts of land acquired and reserved for the exclusive use of the United States which are not

under its exclusive jurisdiction. Even the national cemetery at Arlington, having been acquired without the consent of the Legislature of the State of Virginia, is not under the exclusive jurisdiction of the United States. (United States vs. Penn, 48 Fed., 669.) For a comprehensive review of this question see Fort Leavenworth R. Co. vs. Lowe, 114 U. S., 525; Benson vs. United States, 146 U. S., 325. In those cases it was ruled that where lands are acquired by the United States without the consent of the legislatures of the States in which the lands are located "the possession of the United States, unless political jurisdiction is ceded to them in some other way, is simply that of an ordinary proprietor." We think, therefore, that the words "and under the exclusive jurisdiction thereof" were advisedly used in said sec. 272 and qualify the preceding words of the paragraph. As the District of Columbia is not reserved or acquired for the exclusive use of the United States, it follows that it is not within the intend and meaning of this paragraph. There is still further reason for this conclusion. When Congress, in chapter 13, wished to
30 refer to "any place within the exclusive jurisdiction of the United States" it expressly said so.

The question still remains whether sec. 330 of chapter 14 of the Federal penal code was intended to apply to the District of Columbia. We think that section coextensive in its application with chapter 11. Under chapter 11, as we have noted, the punishment for rape is death, the jury having the right to qualify their verdict in the respect mentioned. Under the corresponding provision in the District code, which has not been repealed, unless by implication, a different and milder punishment is allowed. Sec. 331, referring to the marshal as the officer charged with the execution of the judgment of death, also indicates that Congress did not have in mind the District of Columbia. Moreover, as previously noted, sec. 330 did not constitute new legislation. It was a mere bringing forward of sec. 1 of said act of Jan. 15, 1897. We have, we think, demonstrated that upon the taking effect of the District code on Jan. 1, 1902, sec. 1 of said act of 1897 was no longer applicable to the District of Columbia. The Federal criminal code was approved March 4, 1909, and became effective on the 1st of Jan., 1910. For a period of eight years, therefore, a jury was without authority in this jurisdiction to qualify its verdict in the particular manner authorized by said act of 1897. Congress must be presumed to have known this, and yet it has merely brought forward in the Federal code the provision in the act of 1897, which it knew had not been in force in this jurisdiction for many years. Had Congress intended that this provision should be applicable to this District upon the taking effect of the Federal code, we think the circumstances were such it would have said so in plain and unmistakable language.

31 But there is a still more cogent reason for the conclusion that said sec. 330 has no local application. Chapter 15 contains seven pages of repealing provisions. Apparently every prior enactment of Congress that in any way conflicted with the provisions of

this Federal code was in terms repealed. The act of Feb. 7, 1896, to prohibit prize fighting and pugilism "in the Territories and the District of Columbia," was included in the repealing provisions, the act, as we have seen, having become sections 320 and 321 of chapter 13. These sections were made applicable to the District of Columbia, the revision commission probably overlooking the fact that the same act had been brought forward as sec. 876 of the District code. Said act of Jan. 15, 1897, permitting the jury to qualify their verdict, was also expressly repealed. In no instance in all these repealing provisions do we find any reference to the District code. The last paragraph of sec. 341 of these repealing provisions is general and includes "all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress in so far as they are embraced within and superseded by this act, * * * the remaining portions thereof to be and remain in force with the same effect as if this act had not been passed." Here, again, we find Congress using carefully chosen words. Not only must the acts of Congress have been embraced within the Federal code, but they must have been superseded by it. Intent was thus made the criterion by which to determine whether the provisions of this code displaced existing legislation not specifically repealed. We can not believe that Congress in-
32 tended to subject the people of this District to the uncertainty and confusion that inevitably would have followed a commingling of the two codes. Congress, during the preparation of the criminal code of the United States, having adopted, amended, and added to a comprehensive local code, and having in adopting the former failed expressly to repeal corresponding provisions in the latter, although careful to repeal all corresponding provisions in the general statutes of the United States, must be presumed to have intended the local code to continue in force.

Our attention has been directed to sec. 1639 of the District Code, which, although adopted on March 3, 1901, did not become effective until Jan. 1, 1902. Said section provides that "the enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code; and so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith." Inasmuch as any act of Congress passed after the code became effective would, if embracing any of its provisions, supersede such provisions if enacted with that intent, we think it is apparent that Congress was here legislating with respect to acts passed between March 3, 1901, and the 1st of January following. But for such a provision it might have been contended that an act obviously relating to the District of Columbia, but adopted prior to the taking effect
33 of the code, was of earlier date and hence subordinate to the corresponding provisions of the code. But irrespective of the

construction to be placed upon this section, we are convinced that Congress, in bringing forward sec. 1 of said act of Jan. 15, 1897, as sec. 330 of the criminal code of the United States, did not intend to affect or supersede sections 801 and 808 of the District code prescribing the punishments for the two degrees of murder and for rape. The Federal code embraces general legislation of general operation; the District code, local legislation of local operation. An intent to affect or repeal the latter by the enactment of the former ought clearly to appear and will not be implied. Sullivan vs. Goldman, present term. Congress has also given Alaska a comprehensive code of criminal law and procedure, especially suited to conditions there existing (30 Stat., 1253–1341). This tends further to support our conclusion that the general provisions of the Federal code were not intended to affect our local code.

The judgment must be affirmed.

Affirmed.

34 MONDAY, *March 4th, A. D. 1912.*

ARTHUR JOHNSON, APPELLANT.
vs.
THE UNITED STATES. } No. 2349.

Appeal from the Supreme Court of the District of Columbia. This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this court that the judgment of the said Supreme Court in this cause be, and the same is hereby, affirmed.

Per Mr. JUSTICE ROBB.
March 4, 1912.

35 FRIDAY, *March 8th, A. D. 1912.*

ARTHUR JOHNSON, APPELLANT.
vs.
THE UNITED STATES. } No. 2349.

On consideration of the motion for a rehearing and reargument in the above-entitled cause, it is by the court this day ordered that said motion be, and the same is hereby, overruled. And it is further ordered that the mandate in said cause be, and the same is hereby, stayed until further order.

36 MONDAY, *March 11th, A. D. 1912.*

ARTHUR JOHNSON, APPELLANT.
vs.
THE UNITED STATES. } No. 2349.

The motion for the allowance of a writ of error to remove the above-entitled cause to the Supreme Court of the United States was

submitted to the consideration of the court by Mr. Paca Oberlin, of counsel for the appellant, in support of motion. On consideration whereof, it is by the court this day ordered that said motion be, and the same is hereby, overruled.

37 Court of Appeals of the District of Columbia.

ARTHUR JOHNSON, APPELLANT, *vs.* THE UNITED STATES. } No. 2349.

Assignment of errors.

The following assignment of errors, on writ of certiorari from the Supreme Court of the United States to the Court of Appeals of the District of Columbia, is made:

1. The Court of Appeals erred in affirming the judgment of the trial court overruling the motion in arrest of judgment.

2. The Court of Appeals erred in affirming the judgment of the trial court sustaining the objection to the following question propounded by counsel for the defendant, to talesmen who were afterwards sworn and served as jurors:

"Mr. Clift, if you should be sworn as a juror in this case and after hearing all the evidence would find that the defendant is guilty of murder in the first degree, and if the court instructed you that, under the laws of the District of Columbia, you could add the words 'without capital punishment,' would you add those words if, on the whole evidence, you believed it would be not just or wise to impose the death penalty?" (Rec. 7 and 8.)

3. The Court of Appeals erred in affirming the judgment of the trial court refusing to grant the prayer offered by the defendant, which was as follows:

"The jury are instructed that if under the law and evidence in this case they find the defendant guilty as indicted, they may add to their verdict the words 'without capital punishment,' if upon a view of the whole evidence the jury are of the opinion that it would not be just or wise to impose the death penalty." (Rec. 9.)

38 4. The Court of Appeals erred in affirming the judgment of the trial court wherein the judge in his charge instructed the jury that—

"If you find the defendant is guilty of murder in the first degree, return your verdict, guilty as indicted." (Rec. 13.)

5. The Court of Appeals erred in affirming the judgment of the trial court based, as appears from the record herein, page 3, upon a verdict of the jury composed in part of persons whose names were drawn in the manner prescribed in section 209 of the Code of Laws for the District of Columbia—such method of drawing jurors being expressly excepted therein, in capital cases.

6. The Court of Appeals erred in refusing to grant the motion for rehearing and reargument; and in finally affirming the judgment of the trial court.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorney for Arthur Johnson.

(Endorsed:) No. 2349. Arthur Johnson, Appellant, *vs.* The United States. Assignment of errors. Court of Appeals, District of Columbia. Filed Mar. 19, 1912. Henry W. Hodges, clerk.

39 In the Court of Appeals of the District of Columbia.

ARTHUR JOHNSON, APPELLANT,
vs.
THE UNITED STATES. } No. 2349.

The appellant hereby designates the following portions of the record, among others, to be included in the transcript of the record in this cause from the Court of Appeals of the District of Columbia to the Supreme Court of the United States, to wit:

1. Transcript of the record.
2. Order allowing appellant to proceed in forma pauperis.
3. Argument of cause.
4. Opinion of the court.
5. Judgment.
6. Order overruling motion for rehearing and reargument.
7. Order overruling motion for writ of error.
8. Assignment of errors.
9. This designation.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Arthur Johnson.

(Indorsed:) No. 2349. Arthur Johnson, appellant, v. The United States. Appellant's designation of record. Court of Appeals, District of Columbia. Filed March 19, 1912. Henry W. Hodges, clerk.

40 Court of Appeals of the District of Columbia.

I, Henry W. Hodges, clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to 39, inclusive, contain a true copy of the transcript of record and proceedings of said court of appeals as designated by counsel in the case of Arthur Johnson, appellant, vs. The United States, No. 2349, January term, 1912, as the same remain upon the files and records of said court of appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said court of appeals, at the city of Washington, this 19th day of March, A. D. 1912.

[SEAL.] HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

41 Supreme Court of the United States.

No. 1075, October term, 1911.

ARTHUR JOHNSON, PETITIONER,
vs.
THE UNITED STATES.

On petition for writ of certiorari to the Court of Appeals of the District of Columbia.

On consideration of the petition for a writ of certiorari herein to the Court of Appeals of the District of Columbia and of the argument of counsel in support of the same, it is now here ordered by the court that the said petition be, and the same is hereby, granted, the record presented with the petition to stand as a return to the writ.

April 22, 1912.

42 (Indorsed:) File No. 23151. Supreme Court of the United States. October term, 1911. Term No. 1075. Order on petition for writ of certiorari. Filed April 22, 1912.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER,
v.
THE UNITED STATES. } No. —.

MOTION FOR LEAVE TO FILE PETITION FOR WRIT OF CERTIORARI IN FORMA PAUPERIS.

Now comes Arthur Johnson, the defendant in the above-entitled cause, by his attorneys, and moves this honorable court for leave to file and prosecute *in forma pauperis* a petition for a writ of certiorari to the Court of Appeals of the District of Columbia in said case, which is entitled in said Court of Appeals "Arthur Johnson, appellant, *v.* The United States, No. 2349," and for reason therefor says that the defendant is destitute and unable to pay the costs of said action, or to give security for the payment of the same, as set forth in the affidavit hereto attached and made a part hereof.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Defendant.

The United States consents to an order permitting petitioner to prosecute *in forma pauperis*.

F. W. LEHMANN,
Solicitor General.

36974—12

In the Supreme Court of the United States.

ARTHUR JOHNSON, PETITIONER,
v.
THE UNITED STATES.
No. —.

DISTRICT OF COLUMBIA, *to wit:*

Arthur Johnson, being first duly sworn according to law, deposes and says that he is the petitioner in the above-styled action, wherein he seeks to have this honorable court review a judgment of the Court of Appeals of the District of Columbia by a writ of certiorari. That he is advised by counsel and believes that he has a meritorious cause for review by this honorable court. That by reason of his poverty he is unable to pay the costs of said action or to give security for the payment of the same.

Petitioner was convicted in the Supreme Court of the District of Columbia of murder in the first degree and sentenced to be executed. The trial court refused to submit to the jury the question as to whether petitioner was entitled to the benefits of section 330 of an act of Congress approved March 4, 1909, and known as "The Criminal Code of the United States," which reads as follows:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return

a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

After conviction, petitioner prosecuted his appeal to the Court of Appeals of the District of Columbia, which court affirmed the judgment of the trial court. Petitioner has prepared his petition to this honorable court for the issuance of a writ of certiorari to the Court of Appeals to review said judgment, in which request the Attorney General of the United States, by and through the Solicitor General, has joined.

The purpose of this application is to permit petitioner to proceed *in forma pauperis*, as provided by an act of Congress approved July 20, 1892, 27 Stat., 252.

Petitioner therefore respectfully prays that he may be permitted to prosecute his said action *in forma pauperis*.

ARTHUR JOHNSON.

Subscribed and sworn to before me this 18th day of March, 1912.

[SEAL.] WM. CLABAUGH,
Notary Public in and for the District of Columbia.

We hereby certify that we believe the facts to be as stated in foregoing affidavit.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Arthur Johnson.

○

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER, v. THE UNITED STATES OF AMERICA.	No.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

STATEMENT.

Your petitioner, Arthur Johnson, asks the court to review, by writ of certiorari, a judgment of the Court of Appeals of the District of Columbia affirming a judgment of the Supreme Court of the District of Columbia in a capital case, in which the petitioner is now under sentence of death.

This case is the first ruling by the courts of this District on the questions presented, and involves a construction of chapter 11 of the Criminal Code of the United States, which went into effect January 1, 1910, prescribing what constitutes murder and other serious offenses and fixing punishments therefor, and of section 330 of chapter 14 of said Criminal Code, authorizing qualified verdicts in capital cases.

Since the decision of the trial court in this case, holding that said section 330 did not apply to the

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District of Columbia, two other justices of the Supreme Court of this District have held that said section is applicable to the District, and that the jury may qualify their verdict by adding "without capital punishment." These two justices are at present holding the criminal courts in the District before whom all prisoners now in jail would come for trial. Seven prisoners are awaiting trial for the crime of murder in the first degree.

The construction placed by the Court of Appeals upon chapter 11 and section 330 of the Criminal Code, in this case, will affect the administration of the Federal criminal law throughout the United States, wherever it has acquired or reserved lands for its exclusive use and wherever there are lands under its exclusive jurisdiction, as well as in the District of Columbia. The precise question involved herein is whether section 330 of the Criminal Code applies to the District of Columbia. If chapter 11 thereof applies, section 330 necessarily applies; but section 330 may apply irrespective of the application of chapter 11. Petitioner therefore asks this review for the purpose of having this court decide the important and far-reaching question of law:

Whether a jury, in the District of Columbia, may add to their verdict of murder in the first degree, the words "without capital punishment."

Petitioner was charged with the crime of murder in the first degree, in that he took the life of one John Ofenstein, in the District of Columbia, on

December 5, 1910; and was tried and convicted and sentenced to death by hanging. By various stays the date of execution has been postponed until April 15, 1912.

In the trial he was deprived of a substantial right, in that the court held that chapter 11 and section 330 of the Criminal Code did not apply to this District. Section 272, chapter 11, provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed: * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. * * *

This enactment as well as section 330 is contained in an act of Congress approved March 4, 1909 (35 Stat., 1088), entitled "An act to codify, revise, and amend the penal laws of the United States." The enacting clause reads: "*Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the penal laws of the United States be, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows." Chapter 11 is entitled "Offenses

within the admiralty and maritime and the territorial jurisdiction of the United States." Chapter 14, in which is found section 330, is entitled "General and special provisions."

Section 330, chapter 14, reads:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

During the selection of the jury the following question was propounded by counsel for the defendant to talesmen who were later sworn and served as jurors in the case:

> Mr. Clift, if you should be sworn as a juror in this case and after hearing all the evidence would find that the defendant is guilty of murder in the first degree, and if the court instructed you that, under the laws of the District of Columbia, you could add the words "without capital punishment," would you add those words if, on the whole evidence, you believed it would be not just or wise to impose the death penalty?

to which objection was made and the objection being sustained by the court, an exception was duly noted. (Record, pp. 7 and 8.)

At the trial, after the evidence was all in and before the jury had retired to consider their verdict, the

defendant's prayer for an instruction in the following words was refused:

> The jury are instructed that if under the law and evidence in this case they find the defendant guilty as indicted, they may add to their verdict the words "without capital punishment," if upon a review of the whole evidence the jury are of the opinion that it would not be just or wise to impose the death penalty.

An exception to the refusal to give this instruction was then and there duly noted (9). In the course of the charge to the jury the court said, "If you find the defendant is guilty of murder in the first degree, return your verdict, guilty as indicted" (13).

Thereupon the jury retired, and later returned and declared their verdict to be "that the said defendant is guilty of murder in the first (1st) degree in manner and form as charged in the indictment in this case (4)." Judgment and sentence followed; and on appeal to the Court of Appeals, the judgment was finally affirmed, in an opinion written by Mr. Justice Robb, handed down March 4, 1912. A motion for rehearing was made in the Court of Appeals, and overruled March 8, 1912. An application was made to the Court of Appeals for the allowance of a writ of error out of this court, but the application was denied. The mandate of the Court of Appeals was withheld until the petitioner shall have an opportunity to apply to this court for relief.

Your petitioner believes that the aforesaid judgment of said Court of Appeals, the judgment and sentence of the said Supreme Court of the District of Columbia, and all proceedings leading up to said judgments are erroneous and null and void, for the reasons and on the grounds herein set forth, and which appear in the record herein; and that the construction of law and manner of proceeding in said case have deprived your petitioner of substantial rights.

Wherefore petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this honorable court, directed to the Court of Appeals of the District of Columbia, requiring that court to certify and send to this court, on a day certain to be therein designated, a full and complete transcript of the record and all proceedings of said Court of Appeals in the said case therein, entitled "*Arthur Johnson, appellant,* v. *The United States,* No. 2349 (No. 27, Special Calendar)," to the end that the said case may be reviewed and determined by this court, as provided in section 251 of an act entitled "An act to codify, revise, and amend the laws relating to the judiciary," approved March 3, 1911 (36 Stat., 1087), which authorizes the Supreme Court of the United States to require by certiorari, or otherwise, certain cases in which the decrees of the Court of Appeals of the District of Columbia are made final, to be certified to this court for its review and determination; and that your petitioner may have such other and

further relief or remedy in the premises as to this court may seem appropriate and in conformity with law and the acts of Congress in such cases made and provided, and that the said judgment of the said Court of Appeals, and every part thereof, may be reversed by this honorable court.

And your petitioner will ever pray.

ARTHUR JOHNSON.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Petitioner.

DISTRICT OF COLUMBIA, *ss:*

Arthur Johnson, being duly sworn, says that he is the petitioner in the aforegoing petition by him subscribed, that the same is true to the best of his knowledge and belief, and that the therein stated upon knowledge are true and those stated upon information and belief he believes to be true.

ARTHUR JOHNSON.

Sworn to and subscribed before me this 18 day of March, A. D. 1912.

[SEAL.]

WM. CLABAUGH,
Notary Public.

BRIEF.

I.

As to the application of chapter 11 of the criminal code to the District of Columbia.

This depends upon the construction to be given to the following words contained in section 272 thereof:

> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.

The enactment and administration of criminal law is an exercise of sovereignty. No contention has ever arisen that over the District of Columbia Congress exercises this power and all power necessary in connection with the use of the District of Columbia as the seat of government. For all time the Constitution fixes the purposes for which the District of Columbia was acquired, the method of acquirement being by cession from Virginia and Maryland. Congress has declared the District of Columbia to be *accepted* for "the permanent seat of the Government of the United States." (Secs. 1 and 3, act of July 16, 1790, 1 Stat., 139.) The court will not look behind the declarations of the political department to see the actual uses to which lands are put in construing the application of statutes relating thereto. In *Benson* vs. *The United States* (146 U. S., 331) it was said in

regard to Federal jurisdiction over Fort Leavenworth Military Reservation:

> It is contended by appellant's counsel that * * * jurisdiction passed to the General Government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the Government. The entire tract had been legally reserved for military purposes. (*United States* v. *Stone*, 2 Wall., 525, 537.) The character and purposes of its occupation having been officially and legally established by that branch of the Government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put.

Hence, the District of Columbia having been acquired for the specific purpose mentioned, the court will look only to the status of the District as determined by the political department, from which it will follow that this District comes within the language of the third division of section 272, as lands acquired "for the exclusive use of the United States, and under the exclusive jurisdiction thereof."

Again, if the words "exclusive use" are to be construed as having been used conjunctively with the words "under the exclusive jurisdiction thereof,"

thereby limiting the broad meaning of the latter words, the former words must be given the meaning which is proper for the place in which they are found. Broader and clearer language could not be found than "under the exclusive jurisdiction" of the United States to extend chapter 11 to the District of Columbia. These are words appropriate for the purpose for which they are used. Not so with the words "exclusive use," which is an expression more usually referring to matters between private persons, in relation to the possession, title, or occupation of land, and not to that right of ultimate political dominion which all states and nations possess over their soil, irrespective of private titles to portions thereof. Finding the words "exclusive use" used in this connection, the proper meaning to be given them is that of a *use* for the exercise of sovereignty, or as applicable to operations and instrumentalities of the General Government in connection with lands acquired or reserved. With such meaning attached to these words, the lands contained within the District of Columbia are clearly within the designation of lands acquired for the exclusive use of the United States, and under their exclusive jurisdiction.

It will hardly be seriously contended that the construction is to be restricted to lands of which the United States has the exclusive use in the ordinary proprietary sense. (*United States* v. *Penn.*, 48 Fed., 669.) But even then there are large tracts of land in the District of Columbia falling within that description, such as the Capitol Grounds, the arsenal grounds, sites for

public buildings, and the streets and highways owned by the Government in fee. The streets and public squares in the District of Columbia were conveyed "for the use of the United States forever." (Van *Ness* v. *Washington*, 4 Pet. (U. S.), 232, 284; *Edmonds* v. *B. & P. R. Co.*, 114 U. S., 453, 460.)

Congress evidently intended to extend the operation of the Criminal Code to every part of the United States for which it ought to legislate. In paragraphs 1, 2, and 4 of section 272, it legislated as to crimes on the high seas, certain vessels, and certain islands. By the last half of division three of that section, it legislated as to all places *purchased* by the consent of State legislatures, also as to places *otherwise acquired* by such consent for the purposes mentioned therein, which includes other needful buildings as well as forts, etc. By section 289 the doing or omitting to do any act or thing not made penal by any law of Congress, which if committed or omitted within the jurisdiction of the State, Territory, or District in which the places described in section 272 are situated would be penal, is made a like offense against the United States and made subject to a like punishment. It is thus seen that as to all lands reserved or acquired for the United States ample provision has been made to extend the Criminal Code to them, whether they be for forts, etc., or other purposes, and whether they be acquired by purchase, or otherwise acquired, or reserved, with the complete or partial consent of the State legislature; and unless there are other lands to which the first part of division three, section 272,

may apply, that language considered as describing a single class must apply to the District of Columbia, or be given no effect whatever.

But if the clauses "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof," are to be construed to have been used disjunctively, that is, as describing two distinct classes of lands, what would be the effect as to the applicability of chapter 11 to the District of Columbia?

It will be observed that the principal portions of section 272 were taken from the prior law found in section 5339, Revised Statutes of the United States, which, in part, provided that—

> Every person who commits murder—
> First. Within any fort, arsenal, dockyard, magazine, or in any other place or district or country under the exclusive jurisdiction of the United States; * * * shall suffer death.

This section was necessarily in force in the District of Columbia. (*Winston* vs. *The United States*, 172 U. S., 303; *United States* vs. *Guiteau*, 1 Mackey, 498.) Note the words "in any other place or district or country under the exclusive jurisdiction of the United States," which are the ones that made the section applicable to the District of Columbia. At this point it should be noticed that it was as to the crime of murder as prescribed in this section that the act of January 15, 1897 (29 Stat., 487), authorizing qualified verdicts in capital cases, was held to be applicable to the District of Columbia. No impor-

tance can be attached to the use of the words *exclusive jurisdiction* in the statute, instead of the words *exclusive legislation* as used in the Constitution. Congress exercises power of exclusive legislation over the District of Columbia, and *like authority* over all places purchased by the consent of State legislatures. Nor is it believed that any distinction can or should be drawn from the fact that the term *lands* is used in division three, section 272, instead of *place* or *district*, as used in the Constitution, in connection with the term exclusive jurisdiction. It is not clear whence the compilers of the Criminal Code drew the term "exclusive use" contained in said division three, but it is believed that it was used in view of the intimation contained in the *Fort Leavenworth* case (114 U. S., 525), which drew a distinction between lands purchased by consent of a State and lands otherwise acquired over which partial jurisdiction had been relinquished by the State, to the effect that so far as the land is used as an instrument for the execution of the powers of the General Government it was beyond the control of the State, but that upon cessation of such use by the United States jurisdiction reverts to the State. See also *Chicago, Rock Island and Pacific Railway Co.* vs. *McGlinn* (114 U. S., 543, 546) as to reversion to State jurisdiction.

In 1897 Congress took up the matter of revising and codifying the penal laws of the United States (30 Stat., 58). Steps were also taken about that time for the enactment of a code of laws for the District of Columbia, and on March 3, 1901, such a code

was passed to become effective January 1, 1902. This code is not a complete codification of either the general or criminal laws in force in the District of Columbia. Many, very many, of the sections of the Revised Statutes of the United States were in force here between the taking effect of the District Code and of the Criminal Code—a period of eight years. Most of the sections of the Revised Statutes of the United States so in force here are now found in the first ten chapters of the Criminal Code; and it is not contended in any quarter that those ten chapters do not apply to the District of Columbia. Thus it is seen that Congress enacted only partial criminal legislation for the District in the code of 1902; taking further time to enact a general criminal code which should cover the whole United States, and, of course, including the District of Columbia. That such was the intent of Congress is indicated by the second clause of section 1639 of the District Code. The whole section reads as follows:

> SEC. 1639. The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.

This clearly indicates an intention that future acts passed both before and *after* the District Code went into effect should operate to repeal portions of the code inconsistent therewith. The repealing clause of the Criminal Code, section 341, after expressly repealing certain sections of the Revised Statutes of the United States and acts of Congress, contains the general repealing clause usual in such cases in the last paragraph and is as follows:

> Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed.

On this point Mr. Justice Anderson, of the Supreme Court of the District of Columbia, in the case of the *United States* v. *Matthews*, which was one of the capital cases tried since the trial of this case and before the Court of Appeals rendered its decision herein, and in which section 330 was held to be applicable to this District, expressed the following views at the trial:

> Fifth. It is next contended on the part of the Government that this Federal Penal Code only repeals certain sections of the Revised Statutes and certain acts and parts of acts of Congress, but that it does not purport to repeal the District Code. It is certainly true that it does not purport to repeal the

District Code as a whole, or even to repeal all provisions thereof relating to crimes, any more than it purports to repeal all sections of the Revised Statutes or other acts of Congress relating to crimes. Section 341 of the Federal Penal Code expressly provides:

"The following sections of the Revised Statutes and acts and parts of acts are hereby repealed. * * *

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

The District Code is, of course, an act of Congress in every sense of the term, and section 1639 of the District Code directs that it shall be treated and considered and the general rule of repeal by subsequent acts inconsistent therewith applied.

Moreover, it is to be observed that section 320 of the Federal Penal Code, being the section relating to prize fights, bull fights, etc., is expressly stated in the section itself to "apply only within the Territories of the United States and the District of Columbia." It certainly can not be said, therefore, that this Federal Penal Code has no application to the District of Columbia and no effect upon the District Code. And in view of the evident care manifested by Congress in expressly re-

stricting the operation of certain chapters and sections where a limited operation only was intended, it ought not to be said that a limitation was also intended where not expressed.

In Tucker and Blood's "Federal Penal Code of 1910," in regard to section 272, it is said: "This section is partly founded on U. S. Rev. Sts., secs. 5339 and 5570, and the act of Sept. 4, 1890, c. 874, sec. 1 (26 Stat., 424). And a part of the section is new." Concerning division three, section 272, it is said in this work: "This applies to the District of Columbia. *United States* v. *Guiteau* (1 Mackey, 498)."

II.

As to the applicability of section 330 of the Criminal Code, authorizing the jury, in capital cases, to add to their verdict "without capital punishment," to the District of Columbia.

In this part of the brief it is contended that this section is in force here, irrespective of the application of chapter 11 of the Criminal Code to this locality. Of course, much that has been said with regard to section 272 is also forceful in determining the application of section 330. For instance, that Congress contemplated further additions and amendments to the District Code and that section 330 is a bringing forward of the mitigated penalty of the act of January 15, 1897.

Chapter 14, in which this section is found, is entitled "General and special provisions." This chapter contains no limitation other than that found in section

326 concerning State jurisdiction, which has no relation to the question here presented. A limitation should not be implied where none is expressed. See views of Mr. Justice Anderson, quoted above.

The Code of Laws for the District of Columbia divided murder into classes of first and of second degree, the punishment of the former to be by death by hanging, and the latter by imprisonment for life or for not less than 20 years. (Secs. 798 to 801, D. C. Code.) From intimations in the case of *Winston* v. *The United States* (172 U. S., 303), it might be argued that Congress had already accomplished for the District the same results in mitigation of the punishment for the common-law crime of murder that has been done in some jurisdictions by authorizing qualified verdicts, and that Congress could not, therefore, have intended by section 330 to further lighten the punishment. But the force of this argument is completely broken by the Criminal Code itself, for it likewise divides murder into two classes, that of first and of second degree. (Sec. 273.) Furthermore, section 330 of the Criminal Code is a reenactment of the act of January 15, 1897, authorizing qualified verdicts in capital cases, and which was in force in the District of Columbia. (*Winston* v. *The United States*, 172 U. S., 303.)

The clause, "all laws of the United States which are not locally inapplicable," was contained in section 93 of the Revised Statutes relating to the District of Columbia. In section 3 of an appropriation act

approved July 2, 1864, Congress made a general provision as to the competency of witnesses. On the same day, another act, containing substantially the same provisions, relating specially to the District of Columbia, was approved. Later, on March 3, 1865, section 3 of the general act was amended. The act from which section 93, Revised Statutes, relating to the District of Columbia, was taken, was approved February 21, 1871. On the question of the competency of witnesses in the courts of the District of Columbia, in the case of *Page* v. *Burnstine* (102 U. S., 664), Mr. Justice Harlan, delivering the opinion of the court, said that the effect of the words "all laws of the United States which are not locally inapplicable"—

> was to import into or add to the special act of July 2, 1864, relating to the law of evidence in the District, the exception created by the act of March 3, 1865, to the general statutory rule excluding parties as witnesses. This is manifestly so, unless it be that a statute affecting the competency of parties as witnesses in actions by or against personal representatives or guardians in which judgment may be rendered for or against them is "locally inapplicable" to this District. But such a position can not be maintained consistently with sound reason. The same considerations of public policy which would require the enforcement of such a statute as that of March 3, 1865, in the circuit and district courts of the United States, without regard to the laws of

> the respective States, on the same subject, would suggest its application in the administration of justice in the courts of the District.

This construction of the words "not locally inapplicable" was followed in the case of *Chase* v. *The United States* (7 App. D. C., 149, 155, 158) in construing the act of March 3, 1887, amending an act amending section 5352, Revised Statutes of the United States, relating to bigamy, etc. The District Code indicates that this rule of applying general acts of Congress to the District of Columbia should be followed, for the substance of section 93, Revised Statutes, relating to the District of Columbia, is carried forward into the District Code, section 1, and repeated in section 1640. It is further enacted that this rule of construction shall be followed as to crimes in the District of Columbia, for said section 910, the last in chapter 19 of the District Code, which is entitled "Crimes and punishments," reads as follows:

> SEC. 910. Punishment for offenses not covered by provisions of code.—Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or of any general law of the United States not locally inapplicable in the District of Columbia, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both.

In the work above referred to, "The Federal Penal Code of 1910," by Tucker and Blood, regarding

section 330, it is said: "This section applies to the District of Columbia," to which is cited *Fearson* v. *The United States* (10 App. D. C., 536); *Horton* v. *The United States* (15 App. D. C., 310); *Strather* v. *The United States* (13 App. D. C., 132), and *Small* v. *The United States* (16 App. D. C., 501).

An act changing the punishment only is not inconsistent with a failure to modify the elements of the crime also, especially when the punishment is made less. A leading case illustrating this principle, upon a statute relating to murder, arson, and rape is that of *Commonwealth* v. *Wyman* (12 Cush. (Mass.), 237), in which the court, speaking by Mr. Chief Justice Shaw, said:

> The provision of the Rev. Sts., c. 126, sec. 1, imposing the penalty of death for arson was not in terms repealed by the St. 1852, c. 259. They are both affirmative; each fixes a certain, but different, penalty for the same act. Arson by the burning of the dwelling house in the nighttime was an offense at common law, and neither statute did much more than declare the punishment. Where a subsequent act is not in terms repealed, the question whether the prior act is repealed by implication depends upon the point whether they are repugnant or whether they may both well stand and have their proper application. If they are repugnant, the former must yield, because, the presumption being conclusive that the legislature intended and determined that the latter should take effect,

> the implication is necessary that they intended to repeal the former. * * * But when there is no such repugnancy there is no such repeal by implication.
>
> Between these two legal enactments there is no such repugnancy. Each declares arson punishable. Two acts, *in pari materia*, each declaring a certain act to be a crime, may well stand and be enforced at the same time. The repugnancy is in the provision for the penalty; therefore the law declaring the punishment of death for the offense was repealed by an implication unavoidably necessary.

Sound reason, public policy, express statute, and settled rules of construction therefore dictate such construction of the Criminal Code as will extend the merciful provision of section 330 to the District of Columbia.

Persons convicted of murder in the District of Columbia can not come to this court by writ of error; in this District there is no other way than by certiorari—a means entirely in the discretion of the court. The applicability of the Criminal Code to this District is not only of vast importance to the people resident here but to the General Government and the country at large. Sooner or later the question as to what jurisdictions chapters 11 and 14 apply will be brought before this court. Doubtless cases will come up on writ of error, under section 238 of the act entitled "An act to codify, revise, and amend the laws relating to the judiciary" (36 Stat., 1087), on

the question of jurisdiction. It is obvious that the question should be finally determined at an early date by the court of last resort.

This case presents a situation more important than any property rights, as it involves directly the life of this petitioner. And there are eleven persons now in jail awaiting trial on charges of murder (seven first-degree and four second-degree) whose rights will be affected by the determination of the questions herein presented; and the punishment of one, a woman, Mattie Lomax, now under sentence of death may be affected. So that, as the matter now presents itself to the court, it involves 12 or 13 human lives.

The case of *Winston* vs. *The United States*, No. 431, October term, 1898, U. S. Supreme Court, holding that the act of January 15, 1897, authorizing qualified verdicts in capital cases, was applicable to the District of Columbia, was brought to this court on a writ of certiorari, in *forma pauperis*. See also *Strather* vs. *Same*, No. 432, and *Smith* vs. *Same*, No. 433. These cases are reported in 172 U. S., at page 303.

In view of the importance of this question, the diversity of holdings below among the justices of the Supreme Court of the District of Columbia, the fact that it is desirable and advantageous to have uniform administration of this act, the probability that a decision of this matter now will prevent numerous appeals and petitions to this court in like cases, and the fact that in no other way than by petitions

similar to the one in this case can persons convicted of murder in this District be heard here, it is respectfully submitted that the prayer of petitioner for certiorari ought to be granted.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Arthur Johnson.

MARCH 16, 1912.

WASHINGTON, D. C., *March 21, 1912.*

The nature of the case, and the question involved, is such that I believe the writ of certiorari should be granted.

F. W. LEHMANN,
Solicitor General.

O

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In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER,
v.
THE UNITED STATES OF AMERICA. } No. 1075.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

STATEMENT.

Petitioner was charged with the crime of murder in the first degree, in that he took the life of one John Ofenstein, in the District of Columbia, on December 5, 1910. He was tried and convicted in May, 1911.

During the selection of the jury the following question was propounded by counsel for the defendant to talesmen who were later sworn and served as jurors in the case:

> Mr. Clift, if you should be sworn as a juror in this case and after hearing all the evidence would find that the defendant is guilty of murder in the first degree, and if the court

> instructed you that, under the laws of the District of Columbia you could add the words "without capital punishment," would you add those words if, on the whole evidence, you believed it would be not just or wise to impose the death penalty?

to which objection was made and the objection being sustained by the court, an exception was duly noted. (Record, p. 7.)

At the trial, after the evidence was all in and before the jury had retired to consider their verdict, the defendant's seventh prayer for an instruction in the following words was refused:

> The jury are instructed that if under the law and evidence in this case they find the defendant guilty as indicted, they may add to their verdict the words "without capital punishment," if upon a view of the whole evidence the jury are of the opinion that it would not be just or wise to impose the death penalty.

An exception to the refusal to give this instruction was then and there duly noted (9). In the course of the charge to the jury the court said, "If you find the defendant is guilty of murder in the first degree, return your verdict, guilty as indicted" (13).

Thereupon the jury retired, and later returned and declared their verdict to be "that the said defendant is guilty of murder in the first (1st) degree in manner and form as charged in the indictment in this case" (4).

After verdict and before sentence, in the motion for new trial and arrest of judgment, the attention of the trial court was called, by affidavit of defendant's attorney, to the fact that the defendant had not been *informed of the nature and cause of the accusation* by the reading of the indictment to him (5). The motion in arrest was overruled (5). Judgment followed, and the defendant was sentenced to death by hanging on July 31, 1911 (5). The date of execution has been postponed by various stays until June 15, 1912.

On appeal to the Court of Appeals of the District of Columbia, the judgment was affirmed, and a motion for rehearing in that court was overruled March 8, 1912. In this motion for rehearing, attention was called to the error in the manner of drawing jurors in this, a capital case. This motion for rehearing is not in the record as it comes from the Court of Appeals; but this same point is raised by the fifth assignment of error filed in that court March 19, 1912.

The case is in this court pursuant to a writ of certiorari to the Court of Appeals granted by this court on April 22, 1912.

ASSIGNMENT OF ERRORS.

The following assignment of errors, on writ of certiorari from the Supreme Court of the United States to the Court of Appeals of the District of Columbia, is made:

1. The Court of Appeals erred in affirming the judgment of the trial court overruling the motion in arrest of judgment.

2. The Court of Appeals erred in affirming the judgment of the trial court, sustaining the objection to the following question propounded by counsel for the defendant, to talesmen who were afterwards sworn and served as jurors:

"Mr. Clift, if you should be sworn as a juror in this case and after hearing all the evidence would find that the defendant is guilty of murder in the first degree, and if the court instructed you that, under the laws of the District of Columbia, you could add the words 'without capital punishment,' would you add those words if, on the whole evidence, you believed it would be not just or wise to impose the death penalty?" (Rec. 7.)

3. The Court of Appeals erred in affirming the judgment of the trial court refusing to grant the prayer offered by the defendant, which was as follows:

"The jury are instructed that if under the law and evidence in this case they find the defendant guilty as indicted, they may add to their verdict the words 'without capital punishment,' if upon a view of the whole evidence the jury are of the opinion that it would not be just or wise to impose the death penalty." (Rec. 9.)

4. The Court of Appeals erred in affirming the judgment of the trial court wherein the judge in his charge instructed the jury that—

"If you find the defendant is guilty of murder in the first degree, return your verdict, guilty as indicted." (Rec. 13.)

5. The Court of Appeals erred in affirming the judgment of the trial court based, as appears from the record herein, page 3, upon a verdict of the jury composed in part of persons whose names were drawn in the manner prescribed in section 209 of the Code of Laws for the District of Columbia—such method of drawing jurors being expressly excepted therein, in capital cases.

6. The Court of Appeals erred in refusing to grant the motion for rehearing and reargument; and in finally affirming the judgment of the trial court.

ARGUMENT.

THE FIRST ASSIGNMENT OF ERROR.

As to the overruling of the motion in arrest of judgment, after the trial court's attention had been called to the failure to read the indictment to the defendant.

The record *recites* that defendant was arraigned, but does not *show* that he was and is therefore fatally defective. "Come as well the attorney of the United States as the defendant, in proper person, in the custody of the warden of the United States jail in and for the District of Columbia, and by his attorney T. M. Baker, Esquire; and, thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like" (Rec. 2). Attention of the trial court was called to this defect by affidavit of defendant's attorney (Rec. 4 and 5).

The trial court erred in refusing to arrest judgment for this defect on the face of the record, and the Court of Appeals erred in not reversing the trial court for this error. The Court of Appeals treats this point as if it were an effort by defendant to impeach or contradict a record by an affidavit, but the only purpose of the affidavit is to call the attention of the court to the defect on the face of the record.

A defendant in a capital case can not waive anything essential.

The Supreme Court of the United States in the case of *Crain* v. *The United States* (162 U. S., 625), said:

> In *Hopt* v. *Utah* (110 U. S., 574) this Court observing that the public has an interest in the life and liberty of the accused person: "Neither can be lawfully taken except in the mode prescribed by law. *That which the law makes essential in proceedings involving the deprivation of life or liberty can not be dispensed with or affected by the consent of the accused,* much less by his mere failure, when on trial and in custody, to object to unauthorized methods."

Attention is also called to *Hill* v. *People*, 16 Mich., 351; *Cancemi* v. *People*, 18 N. Y., 128.

The uniform holding to this effect is founded on both necessity and reason, for if permitted to waive anything essential there would be no line of demarcation in such a case by which to hold that some things might be waived and others might not.

The record does not show that the indictment was read to defendant and there is no claim that the affi-

davit of his attorney is not true. It is immaterial whether or not defendant was asked if he waived reading and replied that he did, the point is that the record does not show that the indictment was read to him. This being so he was not arraigned, and therefore there was no issue and none tried.

Reading of an indictment is necessary in all criminal cases unless waived and in a capital case it can not be waived, and the record in such a case which is silent on that point is the same in legal effect as if it recited that reading was waived, or indictment not read, and if either be true the record is fatally defective. (*Crain* v. *United States*, 162 U. S., 625.)

If the court may infer that defendant was arraigned because the record recites that he was by the same token the court may infer if the record recited that *defendant was tried* that all of the essentials of a trial were accorded to defendant.

But the record to be good must show that every essential item of the trial was rightly observed.

It is not sufficient to recite in the record that defendant was tried by a jury, but it must be shown that the jury consisted of twelve men, and that they were competent jurors and good and lawful men, and that they were sworn and that the same jury which began the trial, if respited, resumed the trial, and that defendant was represented by counsel, and that the attorney of the United States, the proper officer for that purpose, prosecuted the defendant, and that the defendant was present in person in court during the trial, etc. No essential of a trial in a capital case may be presumed.

In a capital case a record which does not show that the indictment was read to defendant is fatally defective in law the same as if it did not show that the trial jury was composed of twelve men and that all other requisites were lawfully observed.

The sixth amendment to the Constitution of the United States provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the accusation.

It is the custom in such cases to call the accused before the bar of the court and read to him the indictment. It is then demanded of him whether he pleads guilty or not guilty of the crime charged against him in the indictment. "In capital and other infamous crimes both the arraignment and plea have always been regarded as a matter of substance and must be affirmatively shown in the record." (*Crain* v. *The United States*, 162 U. S., 625.)

This is so well established that the condition should not be disturbed. Informed of the nature of the offense means reading the indictment.

THE SECOND, THIRD, AND FOURTH ASSIGNMENTS OF ERROR.

As to the ruling of the court that a jury in the District of Columbia is not authorized to add to its verdict of murder in the first degree the words "without capital punishment."

The second assignment of error grows out of the refusal of the trial court to permit a question to be put to talesmen, whether they would add the words "without capital punishment" to their verdict if, on

the whole evidence, they believed it would be not just or wise to impose the death penalty (7 and 8).

The third assignment of error raises the question as to the applicability of section 330 of the Criminal Code of the United States (35 Stat., 1088), authorizing qualified verdicts in murder cases, to the District of Columbia, by exception to the refusal of the trial court to give the seventh instruction requested by the defendant, to the effect that the jury might so qualify their verdict (9).

The fourth assignment raises the same question and grows out of that part of the charge of the court, "If you find the defendant guilty of murder in the first degree, return your verdict, guilty as indicted" (13).

The precise question involved in the second, third, and fourth assignments of error is whether section 330 of the Criminal Code applies to this District. If chapter 11 applies, there can be no doubt that section 330 applies; but section 330 may apply irrespective of the application of chapter 11. Consideration will be given first to the latter proposition.

SECTION 330, OF THE CRIMINAL CODE, AUTHORIZING THE JURY, IN CAPITAL CASES, TO ADD TO THEIR VERDICT "WITHOUT CAPITAL PUNISHMENT," APPLIES TO THE DISTRICT OF COLUMBIA.

If section 330 of the Criminal Code authorizing juries in first degree murder verdicts to qualify their verdicts by adding thereto "without capital punishment," is applicable to this District, the rulings of the court below are obviously erroneous. A deter-

mination of the applicability of this section to this District requires careful consideration of the statutes in force here, as to murder and punishment therefor prior to January 1, 1902, the date the code of laws for the District of Columbia went into effect; of the provisions of said District Code relating to the same subjects; and of the provisions of the Criminal Code of the United States, effective January 1, 1910, on the like subject matters.

Prior to January 1, 1902, the date the District Code became effective, section 5339 of the Revised Statutes of the United States was the statute under which the offense of murder in the District of Columbia was prosecuted. (*Winston* v. *The United States*, 172 U. S., 303; *United States* v. *Guiteau*, 1 Mackey, 498.)

By an act entitled "An act to reduce the cases in which the death penalty may be inflicted," approved January 15, 1897 (29 Stat., 487), it was provided:

> That in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto "without capital punishment," and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life.

This act was held to be in force in the District of Columbia. (*Winston* v. *The United States, supra.*)

The District Code, in sections 798, 799, and 800, prescribes what constitutes murder in the first and second degrees. These sections are as follows:

> SEC. 798. *Murder in the first degree.*—Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree.
>
> SEC. 799. Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree.
>
> SEC. 800. *Murder in second degree.*—Whoever with malice aforethought, except as provided in the last two sections, kills another is guilty of murder in the second degree.

In section 801 of this Code, punishments were prescribed for these offenses, as follows:

> SEC. 801. *Punishment.*—The punishment of murder in the first degree shall be death by hanging. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years.

Turning now to the Criminal Code, it is found that sections 272 and 273, chapter 11, provide:

> SEC. 272. The crimes and offenses defined in this chapter shall be punished as herein prescribed: * * *

> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dock-yard, or other needful building. * * *
>
> SEC. 273. Murder is the unlawful killing of a human being with malice aforethought. Every murder perpetrated by poison, lying in wait, or any other kind of willful, deliberate, malicious, and premeditated killing; or committed in the perpetration of, or attempt to perpetrate, any arson, rape, burglary, or robbery; or perpetrated from a premeditated design unlawfully and maliciously to effect the death of any human being other than him who is killed, is murder in the first degree. Any other murder is murder in the second degree.

and that section 330, chapter 14, provides:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict as aforesaid, the person convicted shall be sentenced to imprisonment for life.

It will be noticed that section 272 of the Criminal Code is, in part, substantially a reenactment of that portion of section 5339, Revised Statutes, as to the commission of murder in any "place or district of country under the exclusive jurisdiction of the United

States;" that two degrees of murder are provided for in both the District Code and the Criminal Code; and that the language of section 330 of the Criminal Code is almost identical with that of the act of January 15, 1897, *supra*, which was held to be in force in the District of Columbia.

From intimations in the case of *Winston* v. *The United States*, *supra*, it might be argued that Congress had already accomplished for the District the same results in mitigation of the punishment for the common-law crime of murder, by dividing it into two degrees, that has been done in some jurisdictions by authorizing qualified verdicts, and that Congress could not, therefore, have intended by section 330 to further lighten the punishment. But the force of any such argument is completely broken by the Criminal Code itself, for it likewise divides murder into two degrees.

Further, in the Alaska Code two degrees of murder are prescribed and qualified verdicts by juries are there authorized. See act approved March 3, 1899, ch. 2, secs. 3 and 4 (30 Stat. 1253).

As to any supposed confusion arising from the fact that by section 808 of the District Code the punishment for rape is fixed at imprisonment—

> for not less than five nor more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words "with the death penalty," in which case the punishment shall be death by hanging;

it should be observed that if chapter 11 of the Criminal Code is applicable to the District there is no such confusion, because section 808 of the District Code has been superseded by sections 278 and 279 of chapter 11, which read as follows:

> SEC. 278. Whoever shall commit the crime of rape shall suffer death.
>
> SEC. 279. Whoever shall carnally and unlawfully know any female under the age of sixteen years, or shall be accessory to such carnal and unlawful knowledge before the fact, shall, for a first offense, be imprisoned not more than fifteen years, and for a subsequent offense be imprisoned not more than thirty years.

If, however, it shall be held that chapter 11 is not applicable in this District, the qualifying provision of section 330 can be separated from its application to rape cases, and be given force and effect in first degree murder cases in this District, without giving rise to any conflict with section 808 of the District Code as to punishment for rape. But it is believed that sections 330 and 808 of these codes can be harmonized: the *permission* given in the former to add mitigatory words is not inconsistent with punishment by imprisonment. The power given juries in section 330 to reduce the punishment operates merely to sweep away the power given in section 808 to increase it, leaving the balance of section 808 intact. But it is submitted that no such question of inconsistency or confusion arises in this case; and that it will be time enough to solve that problem when it

arises. It is further to be observed that inconsistency, if it exists, in the permissive provisions of sections 808 and 330 as to punishment in rape cases, is rather an argument to show that Congress intended that chapter 11 of the Criminal Code should extend to the District of Columbia. And, finally, on this point, mere confusion, or even inconsistency, is not sufficient to prevent section 330 from being held to be in force here. Few, if any, statutes are entirely free from conflict or inconsistency with others in some isolated particulars. Inconsistency between section 330 and previous statutes, for the purpose of preventing section 330 from being in force here, must be such inconsistency as clearly exhibits an intent on the part of Congress not to give the people of the National Capital the benefits of this law.

From early times it has been true that whenever there was a statute in favor of life or liberty that construction has been adopted by the courts which would cause it to operate in all places where it could so operate. A general act, prescribing the punishment of a specific offense throughout the State, operates as a repeal of a public local act prescribing a different punishment for a particular locality. (*Nusser* v. *Commonwealth*, 25 Pa. St., 126.)

In the State of New York it was held that section 72 of the Penal Code, punishing the crime of bribery, repealed section 58 of the New York City consolidation act providing for the same offense within the city of New York. (*People* v. *Jachne*, 103 N. Y., 182.)

An act changing the punishment only is not inconsistent with a failure to modify the elements of the crime also, especially when the punishment is made less. A leading case illustrating this principle, upon a statute relating to murder, arson, and rape is that of *Commonwealth* v. *Wyman* (12 Cush. (Mass.), 237), in which the court, speaking by Mr. Chief Justice Shaw, said:

> The provision of the Rev. Sts., c. 126, sec. 1, imposing the penalty of death for arson was not in terms repealed by the St. 1852, c. 259. They are both affirmative; each fixes a certain, but different, penalty for the same act. Arson by the burning of the dwelling house in the nighttime was an offense at common law, and neither statute did much more than declare the punishment. Where a subsequent act is not in terms repealed, the question whether the prior act is repealed by implication depends upon the point whether they are repugnant or whether they may both well stand and have their proper application. If they are repugnant, the former must yield, because, the presumption being conclusive that the legislature intended and determined that the latter should take effect, the implication is necessary that they intended to repeal the former. * * * But when there is no such repugnancy there is no such repeal by implication.
>
> Between these two legal enactments there is no such repugnancy. Each declares arson punishable. Two acts, *in pari materia*, each

> declaring a certain act to be a crime, may well stand and be enforced at the same time. The repugnancy is in the provision for the penalty; therefore the law declaring the punishment of death for the offense was repealed by an implication unavoidably necessary.

The rule of construction by which general acts of Congress are held to be applicable to the District of Columbia has been followed from the beginning.

The clause "all laws of the United States which are not locally inapplicable" was contained in section 93 of the Revised Statutes relating to the District of Columbia. In varying form, but always with the same meaning and effect, words requiring adherence to this rule of application are found in no less than three places in the District Code, as follows:

> SECTION 1. The common law, all British statutes in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, the principles of equity and admiralty, *all general acts of Congress not locally inapplicable in the District of Columbia*, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage of this act shall remain in force except in so far as the same are inconsistent with, or are replaced by, some provision of this code.
>
> SEC. 910. *Punishment for offenses not covered by provisions of code.*—Whoever shall be convicted of any criminal offense not covered by the provisions of any section of this code, or

> *of any general law of the United States not locally inapplicable in the District of Columbia*, shall be punished by a fine not exceeding one thousand dollars or by imprisonment for not more than five years, or both.
>
> SEC. 1640. Nothing in the repealing clause of this code contained shall be held to affect the operation or enforcement in the District of Columbia of the common law or of any British statute in force in Maryland on the twenty-seventh day of February, eighteen hundred and one, or of the principles of equity or admiralty, *or of any general statute of the United States not locally inapplicable in the District of Columbia* or by its terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, or of any municipal ordinance or regulation, except in so far as the same may be inconsistent with, or is replaced by, some provision of this code.

The Criminal Code contains nothing to indicate that this rule of holding general acts applicable to this District should be departed from. Its provisions should therefore be held to apply here. The enacting clause of the Criminal Code reads:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That the *penal laws of the United States be*, and they hereby are, codified, revised, and amended, with title, chapters, headnotes, and sections, entitled, numbered, and to read as follows:

The penal provisions of the District Code are most undoubtedly *penal laws of the United States.*

In reference to the words "not locally inapplicable" as applied to general acts of Congress in their relation to the District of Columbia, this court and the courts of the District have rightfully adopted that construction which has extended the benefits of general acts of Congress to the District whenever possible. In section 3 of an appropriation act, approved July 2, 1864, Congress made a general provision as to the competency of witnesses. On the same day, another act, containing substantially the same provisions, relating specially to the District of Columbia, was approved. Later, on March 3, 1865, section 3 of the general act was amended. The act from which section 93, Revised Statutes relating to the District of Columbia, was taken, was approved February 21, 1871. On the question of the competency of witnesses in the courts of the District of Columbia, in the case of *Page* v. *Burnstine* (102 U. S., 664), Mr. Justice Harlan, delivering the opinion of the court, said that the effect of the words "all laws of the United States which are not locally inapplicable"—

> was to import into or add to the special act of July 2, 1864, relating to the law of evidence in the District, the exception created by the act of March 3, 1865, to the general statutory rule excluding parties as witnesses. This is manifestly so, unless it be that a statute affecting the competency of parties as witnesses in actions by or against personal repre-

> sentatives or guardians in which judgment may be rendered for or against them is "locally inapplicable" to this District. But such a position can not be maintained consistently with sound reason. The same considerations of public policy which would require the enforcement of such a statute as that of March 3, 1865, in the circuit and district courts of the United States, without regard to the laws of the respective States, on the same subject, would suggest its application in the administration of justice in the courts of the District.

This construction of the words "not locally inapplicable" was followed in the case of *Chase* v. *The United States* (7 App. D. C., 149, 156, 157), in construing the act of March 3, 1887, amending an act amending section 5352, Revised Statutes of the United States, relating to bigamy, etc. In that case the District Court of Appeals said:

> Section 5352 of the Revised Statutes, under title "Crimes," and the act of March 22d, 1882, amendatory of section 5352, relating to the crime of bigamy, and to which the act of March 3d, 1887, was passed as an amendment, were both of general application to all Territories, or *other places over which the United States have exclusive jurisdiction.* The act of 1887, being amendatory of the previous statutes, must, in the absence of restrictive terms or something in the nature of the subject-matter that would indicate such restriction, be taken to have the same general and extensive application as the statutes to which it is an

amendment, except as otherwisely expressly provided. This amendatory act of 1887, ch. 397, contains twenty-seven sections, many of which by their restrictive terms, have only a local application. But the first five and the tenth sections of the act are wholly without restrictions, either in terms or by reason of the nature of the subject-matter, and are as general in their application as language can make them; and it would be a most unwarrantable construction to hold that they apply only to some particular Territories, or to Territories exclusive of this District. There is nothing in the language and certainly nothing in the subject-matter of these sections to require such restrictions. It is true, there are several of the sections that may well admit of doubt, whether they were intended to apply to all the Territories of the United States, or only to the Territory of Utah; but no such doubt or ambiguity exists in regard to the first five and the tenth sections of the act. They apply to all places over which the United States have exclusive jurisdiction. Nor is there anything unusual or remarkable in the fact that we find embraced in the same act provisions of general and unlimited application, and provisions of a special or local character. The legislation of Congress abounds with such instances. * * * In our judgment, no fair construction will justify the exclusion of this District from the benefits of the provisions of the sections of the statute to which we have referred. Indeed, by force and effect of the declaration of Congress, that *all the laws* of the United States *which are not*

> *locally inapplicable*, shall have the same force and effect within this District as elsewhere within the United States, these provisions of the act of 1887, ch. 397, are made applicable here. That construction of this declaratory provision was fully adopted and applied by the Supreme Court of the United States, in the case of *Page v. Burnstine*, 102 U. S. 664.

Furthermore, in section 1639 of the District Code, Congress recognized that the District Code was incomplete, and provided that all inconsistent acts of Congress passed *thereafter* should be held to modify its provisions. Said section reads:

> SEC. 1639. The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; *and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.*

In section 341 of the Criminal Code, Congress, after expressly repealing certain sections of the Revised Statutes and acts of Congress, enacts, in the last paragraph, the general repealing clause usual in such cases, as follows:

> Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as they are embraced within and superseded by this act, are hereby

repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed.

On this point, Mr. Justice Anderson, of the Supreme Court of the District of Columbia, in the Matthews case, said:

> The District Code is, of course, an act of Congress in every sense of the term, and section 1639 of the District Code directs that it shall be treated and considered and the general rule of repeal by subsequent acts inconsistent therewith applied.
>
> Moreover, it is to be observed that section 320 of the Federal Penal Code, being the section relating to prize fights, bull fights, etc., is expressly stated in the section itself to "apply only within the Territories of the United States and the District of Columbia." It certainly can not be said, therefore, that this Federal Penal Code has no application to the District of Columbia and no effect upon the District Code. And in view of the evident care manifested by Congress in expressly restricting the operation of certain chapters and sections where a limited operation only was intended, it ought not to be said that a limitation was also intended where not expressed. Without regard, therefore, to the question of whether chapter eleven can be interpreted as broadly as contended for by the defendant, the provisions of chapter fourteen (which is the chapter containing sec. 330) would seem unlimited in their operation and to apply everywhere within the jurisdiction of the

> United States, including, therefore, the District of Columbia. The Court is unable, therefore, to agree with the contention of the Government that chapter fourteen of the Federal Penal Code can not apply to the District of Columbia unless chapter eleven also applies.

In the *McDonald case*, tried after the *Matthews case*, *supra*, and before the decision of the Court of Appeals in this case, Mr. Justice Barnard, of the Supreme Court of this District, followed the ruling of the court in the *Matthews case*.

In "The Federal Penal Code of 1910," by Tucker and Blood, regarding section 330, it is said: "This section applies to the District of Columbia," to which is cited *Fearson* v. *The United States* (10 App. D. C., 536); *Horton* v. *The United States* (15 App. D. C., 310); *Strather* v. *The United States* (13 App. D. C., 132), and *Small* v. *The United States* (16 App. D. C., 501).

In 1897 Congress took up the matter of revising and codifying the penal laws of the United States (30 Stat., 58). Steps were also taken about that time for the enactment of a code of laws for the District of Columbia, and on March 3, 1901, such a code was passed to become effective January 1, 1902. This code is not a complete codification of either the general or criminal laws in force in the District of Columbia. See "Comprehensive General Index of the Laws of the District of Columbia, in force January 1, 1912," published under the authority of an act of Congress, consisting of 421 pages. Many, very many, of the sections of the Revised Statutes of the United

States were in force here between the taking effect of the District Code and of the Criminal Code—a period of eight years. Most of the sections of the Revised Statutes of the United States so in force here are now found in the first ten chapters of the Criminal Code. Thus it is seen that Congress enacted only partial criminal legislation for the District in the code of 1902; taking further time to enact a general criminal code which should cover the whole United States, and, of course, including the District of Columbia.

If the provisions of the Criminal Code do not extend to this District then the District is left without a vast amount of necessary criminal legislation, because of the express repeal of nearly all of the criminal sections of the Revised Statutes of the United States, previously in force here, without any saving clause excepting the District from the operation of the repeal.

Section 798 of the District Code did not in terms repeal section 5339, Revised Statutes of the United States. Nor did it do so by implication, except in so far as it provided a different rule for the District than existed elsewhere. In so far as any portion of section 5339 was not inconsistent with or replaced by section 798 it was the law here until 1910, and to that extent the qualified verdict was applicable here. On the subject of repeal in such a case, Bishop on Statutory Crimes (2d edition) says in section 173:

> AS TO OFFENCE, IN DISTINCTION FROM PUNISHMENT.—Discarding the exceptional doctrine, peculiar to a limited num-

> ber of our tribunals, which holds a mere revision of laws, where there is no repugnance, to operate as a repeal of whatever of the old is within the scope of the new, we shall find the instances rare wherein a statute will by implication repeal the prior law, statutory or common, concerning the offence alone, as distinguished from the punishment. If the old and new are identical, there is no occasion for adjudging a repeal, since certainly they are not repugnant. If they vary from each other, there is still no reason in ordinary circumstances for deeming them repugnant. Numerous shades and degrees of offence may, in the nature of things, and as transactions ordinarily are, attach to a single act; and, if the legislature by separate statutes has provided for more than one of these, no just reasons can forbid all to stand.

Chapter 14, in which section 330 is found, is entitled "General and special provisions." This chapter contains no limitation other than that found in section 326 concerning State jurisdiction, which has no relation to the question here presented. A limitation should not be implied where none is expressed. See views of Mr. Justice Anderson, quoted above.

The mitigatory provision of section 330 does not repeal anything in the District Code, but is merely further and additional legislation.

CHAPTER 11 OF THE CRIMINAL CODE APPLIES TO THE DISTRICT OF COLUMBIA.

It has been shown that the provisions of the Criminal Code should be held to apply here because they are *not locally inapplicable;* and there is nothing in

any act of Congress or in the nature of the subject matter so far as qualified verdicts in capital cases is concerned, to indicate a contrary intention or to require the adoption of a rule of construction that would exclude the people of this District from the benefits of the merciful provision contained in section 330.

In further support of our contention we claim that by a construction of the language of section 272 of the Criminal Code, chapter 11 thereof is expressly made applicable to this District, from which it follows as a necessary consequence that section 330 is in force here. Said section 272 so far as material provides:

> The crimes and offenses defined in this chapter shall be punished as herein prescribed: * * *
>
> Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building. * * *

For all time the Constitution fixes the purposes for which the District of Columbia was acquired, the method of acquirement being by cession from Virginia and Maryland. Congress has declared the District of Columbia to be *accepted* for "the permanent seat of the Government of the United States." (Secs. 1 and 3, act of July 16, 1790, 1 Stat., 139.) The court will

not look behind the declarations of the political department to see the actual uses to which the lands are put in construing the application of statutes relating thereto. In *Benson* v. *The United States* (146 U. S., 331) it was said in regard to Federal jurisdiction over Fort Leavenworth Military Reservation:

> It is contended by appellant's counsel that * * * jurisdiction passed to the General Government only over such portions of the reserve as are actually used for military purposes, and that the particular part of the reserve on which the crime charged was committed was used solely for farming purposes. But in matters of that kind the courts follow the action of the political department of the Government. The entire tract had been legally reserved for military purposes. (*United States* v. *Stone*, 2 Wall., 525, 537.) The character and purposes of its occupation having been officially and legally established by that branch of the Government which has control over such matters, it is not open to the courts, on a question of jurisdiction, to inquire what may be the actual uses to which any portion of the reserve is temporarily put.

Hence, the District of Columbia having been acquired for the specific purpose mentioned, the court will look only to the status of the District as determined by the political department, from which it will follow that this District comes within the language of the third division of section 272, as lands acquired "for the exclusive use of the United States, and under the exclusive jurisdiction thereof."

Again, if the words "exclusive use" are to be construed as having been used conjunctively with the words "under the exclusive jurisdiction thereof," thereby limiting the broad meaning of the latter words, the former words must be given the meaning which is proper for the place in which they are found. Broader and clearer language could not be found than "under the exclusive jurisdiction" of the United States to extend chapter 11 to the District of Columbia. These are words appropriate for the purpose for which they are used. Not so with the words "exclusive use," which is an expression more usually referring to matters between private persons, in relation to the possession, title, or occupation of land, and not to that right of ultimate political dominion which all states and nations possess over their soil, irrespective of private titles to portions thereof. Finding the words "exclusive use" used in this connection, the proper meaning to be given them is that of a *use* for the exercise of sovereignty, or as applicable to operations and instrumentalities of the General Government in connection with lands acquired or reserved. With such meaning attached to these words, the lands contained within the District of Columbia are clearly within the designation of lands acquired for the exclusive use of the United States, and under their exclusive jurisdiction.

It will hardly be seriously contended that the construction is to be restricted to lands of which the United States has the exclusive use in the ordinary proprietary sense. (*United States* v. *Penn.*, 48 Fed.,

669.) But even then there are large tracts of land in the District of Columbia falling within that description, such as the Capitol Grounds, the arsenal grounds, sites for public buildings, and the streets and highways owned by the Government in fee. The streets and public squares in the District of Columbia were conveyed "for the use of the United States forever." (*Van Ness* v. *Washington*, 4 Pet. (U. S.), 232, 284; *Edmonds* v. *B. & P. R. Co.*, 114 U. S., 453, 460.)

Congress evidently intended to extend the operation of the Criminal Code to every part of the United States for which it ought to legislate. In paragraphs 1, 2, and 4 of section 272, it legislated as to crimes on the high seas, certain vessels, and certain islands. By the last half of division three of that section, it legislated as to all places *purchased* by the consent of State legislatures, also as to places *otherwise acquired* by such consent for the purposes mentioned therein, which includes other needful buildings as well as forts, etc. By section 289 the doing or omitting to do any act or thing not made penal by any law of Congress, which if committed or omitted within the jurisdiction of the State, Territory, or District in which the places described in section 272 are situated would be penal, is made a like offense against the United States and made subject to a like punishment. It is thus seen that as to all lands reserved or acquired for the United States ample provision has been made to extend the Criminal Code to them, whether they

be for forts, etc., or other purposes, and whether they be acquired by purchase, or otherwise acquired, or reserved, with the complete or partial consent of the State legislature; and unless there are other lands to which the first part of division three, section 272, may apply, that language considered as describing a single class must apply to the District of Columbia, or be given no effect whatever.

But if the clauses "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof," are to be construed to have been used disjunctively—that is, as describing two distinct classes of lands—what would be the effect as to the applicability of chapter 11 to the District of Columbia?

It will be observed that the principal portions of section 272 are substantially similar to the prior law found in section 5339, Revised Statutes of the United States, which, in part, provided that—

> Every person who commits murder—
> First. Within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States; * * * shall suffer death.

This section was necessarily in force in the District of Columbia. (*Winston* v. *The United States*, 172 U. S., 303; *United States* v. *Guiteau*, 1 Mackey, 498.) Note the words "in any other place or district of country under the exclusive jurisdiction of the

United States," which are the ones that made the section applicable to the District of Columbia.

These words were originally used in section three of an act of Congress approved April 30, 1790 (1 Stat., 113), before the location of the District to be acquired under clause 17, section 8, article 1, of the Constitution, for the seat of government of the United States, had been definitely fixed (*The United States* v. *Guiteau*, 1 Mackey, 498, 527, 528, 529). Said section three reads:

> That if any person or persons shall, within any fort, arsenal, dockyard, magazine, or in any other place or district of country, under the sole and exclusive jurisdiction of the United States, commit the crime of wilful murder, such person or persons on being thereof convicted shall suffer death.

With other immaterial changes, these words, with the omission of "sole and," were later carried into section 5339, Revised Statutes of the United States, which has been expressly repealed by the Criminal Code, section 341, paragraph 2. It is quite evident that this statutory provision has been carried from section 5339 into said section 272, in an expanded and altered form, to harmonize with present conditions. It will be observed that "sole and exclusive jurisdiction of the United States" were the words used in the act of 1790; and that "exclusive use of the United States, and under the exclusive jurisdiction thereof," are the words used in the Criminal Code.

The codifying commission reported material which later became section 272 of the Criminal Code, volume 2, page 1829, as follows:

> SEC. 8929. The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> *First.* When committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on—
>
> (*a*) The high seas, the seas bordering on the United States within a distance of one marine league from the shore, or on any river, haven, creek, basin, or bay immediately connected with such seas;
>
> (*b*) Lake Michigan and the Straits of Mackinaw, and the waters of Lake Superior, Saint Mary's River, Lake Huron, River Saint Clair, Detroit River, Lake Erie, Niagara River, Lake Ontario, River Saint Lawrence, and the Rio Grande del Norte River, to the middle of such waters;
>
> (*c*) Any vessel owned in whole or in part by the United States or any citizen thereof, or any corporation created under the laws of any of the States thereof; or—
>
> *Second.* When committed within or on—
>
> (*a*) Any fort, arsenal, dockyard, magazine, or needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States; or
>
> (*b*) On any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

When Congress came to act upon it, material changes were made and the section was finally enacted in its present form, as follows:

> SEC. 272. The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> First. When committed upon the high seas, or on any other waters within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State, or when committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on board any vessel belonging in whole or in part to the United States or any citizen thereof, or to any corporation created by or under the laws of the United States, or of any State, Territory, or District thereof.
>
> Second. When committed upon any vessel registered, licensed, or enrolled under the laws of the United States, and being on a voyage upon the waters of any of the Great Lakes, namely: Lake Superior, Lake Michigan, Lake Huron, Lake Saint Clair, Lake Erie, Lake Ontario, or any of the waters connecting any of said lakes, or upon the River Saint Lawrence where the same constitutes the international boundary line.
>
> Third. *When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the*

same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building.

Fourth. On any island, rock, or key containing deposits of guano, which may, at the discretion of the President, be considered as appertaining to the United States.

The material changes are indicated by italics.

As to chapter 13, comprising sections 311 to 322, Congress materially modified the commission's proposal. The opening section thereof was inserted, and reads:

SEC. 311. Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States.

As to material for section 313 of the Criminal Code, the commission reported, volume 2, page 1841:

9015. Whoever, having a husband or wife living, shall, in a Territory, marry another, whether married or single, and whoever simultaneously, or on the same day, in any Territory, shall marry more than one woman, is guilty of polygamy, and shall be fined not more than five hundred dollars and imprisoned not more than five years. But this section shall not extend to any person by reason of any former marriage whose husband or wife by such marriage shall have been absent for five successive years and is not known to such person to be living, and is believed by such person to be dead, nor to any person by

> reason of any former marriage which shall have been dissolved by a decree of a competent court, nor to any person by reason of any former marriage which shall have been pronounced void by a decree of a competent court, on the ground of nullity of the marriage contract.

And in a note thereto, volume 1, page 118, said:

> SECTION 9015.—Polygamy: This section is also inserted in the chapter "Offenses within the territorial and maritime jurisdiction of the United States;" hence the words, "or other place over which the United States have exclusive jurisdiction," are here omitted. The section is also embraced in "An act to establish a code of law for the District of Columbia," approved March 3, 1901.

In material for section 318 thereof, the commission reported, volume 2, page 1841:

> SEC. 9016. If any male person, in a Territory, shall cohabit with more than one woman, he shall be fined not more than three hundred dollars, or imprisoned not more than six months, or both.

And in a note thereto said:

> SEC. 9016.—Unlawful cohabitation: The notes on the previous section are here applicable.

For section 320, the commission reported the following, volume 2, page 1842:

> SEC. 9022. Whoever, in any Territory, shall voluntarily engage in a pugilistic encounter

> between man and man or a fight between a man and a bull or any other animal, for money or for other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged, shall be imprisoned not more than five years.

and made comment in a note at page 118, volume 2, as follows:

> SECTION 9022.—Prize fights, bull fights, etc.: The words "or the District of Columbia" are omitted, as this and the following section are embraced in the act to establish a code of law for the District of Columbia already mentioned.

Sections 9016 and 9022 of the commission's report became sections 318 and 320 of the Criminal Code, in the following form:

> SEC. 318. If any unmarried man or woman commits fornication, each shall be fined not more than one hundred dollars, or imprisoned not more than six months.
>
> SEC. 320. Whoever shall voluntarily engage in a pugilistic encounter between man and man or a fight between a man and a bull or any other animal, for money or for other thing of value, or for any championship, or upon the result of which any money or anything of value is bet or wagered, or to see which any admission fee is directly or indirectly charged, shall be imprisoned not more than five years. *The provisions of this section shall apply only within the Territories of the United States and the District of Columbia.*

In each the words "in a Territory" were stricken out. The italicized words in 320 were added.

Thus it will be seen that, notwithstanding the codifying commission expressly negatived any intention to have these sections apply to the District of Columbia, Congress did not follow its suggestion, but made these provisions applicable here.

It is significant that the codifying commission in chapter 13 intended only to refer to certain offenses in the *Territories*, while in chapter 11 its object was to cover fully every part of the United States where Federal criminal legislation was necessary and proper. The commission proposed to extend the provisions of chapter 11 to any fort, etc., "or other place under the exclusive jurisdiction of the United States."

Now, when Congress added to this language, by changing it into the form found in section 272, reverting in a measure to the language of section 5339 and to the act of April 30, 1790, it clearly appears to have intended to make chapter 11 applicable to the District of Columbia. By a similar process of alteration Congress extended the provisions of chapter 13 to this District.

It is not otherwise clear whence the compilers of the Criminal Code drew the term "exclusive use" contained in division 3, section 272, but it is believed that it was used partly in view of the intimation contained in the *Fort Leavenworth case* (114 U. S., 525), which drew a distinction between lands purchased by consent of a State and lands otherwise acquired over which partial jurisdiction had been relinquished by

the State, to the effect that so far as the land is used as an instrument for the execution of the powers of the General Government it was beyond the control of the State, but that upon cessation of such use by the United States jurisdiction reverts to the State. See also *Chicago, Rock Island and Pacific Railway Co.* v. *McGlinn* (114 U. S., 543, 546) as to reversion to State jurisdiction.

In the work of Tucker and Blood, "Federal Penal Code of 1910," in regard to section 272, it is said: "This section is partly founded on United States Revised Statutes, sections 5339 and 5570, and the act of September 4, 1890, chapter 874, section 1 (26 Stat., 424). And a part of the section is new." Concerning division 3, section 272, it said in this work: "This applies to the District of Columbia. (*United States* v. *Guiteau*, 1 Mackey, 498)."

THE FIFTH AND SIXTH ASSIGNMENTS OF ERROR.

These assignments of error raise the question as to the lawfulness of drawing jurors, in a capital case, in the manner prescribed in section 209 of the District Code. That section provides:

> SEC. 209. If at any time during the impaneling of a jury, *in any other than a capital case*, the regular panel, by reason of challenge or otherwise, shall be exhausted before the jury is complete the court may, in its discretion, direct the clerk to draw from the box the names of other persons to serve as jurors and cause them to be summoned, or order the marshal to summon as many talesmen as may be necessary to complete the jury.

There is no other provision in the District Code for the drawing of juries in criminal cases in the District of Columbia. As to completion of a jury to try a capital case, there is an entire absence of statutory authority for impaneling.

The record discloses that the jury which tried the defendant in this case was actually completed in the manner prescribed in section 209 of the District Code (3).

The history of legislation as to impaneling juries in criminal cases, beginning with the Revised Statutes of the United States relating to the District of Columbia, approved June 22, 1874, is as follows:

Chapter 24 of said Revised Statutes, entitled "Jurors," after providing in sections 851 to 856 for the making of lists of jurors, the selection of the names, placing same in the jury box, its sealing, breaking, and drawing of twenty-three names for grand jurors and twenty-six for petit jurors, provides in section 857 for jurors in capital cases in the following language:

> SEC. 857. In a capital case where the panel shall be exhausted by reason of challenge or otherwise, the court may, in its discretion, order additional names to be drawn; and if all of the names in the box shall be drawn out and no jury found, the court may order the marshal to summon talesmen until a jury shall be found.

In sections 858 to 862 provision is made for jurors for the circuit court, drawing of additional names

from the jury box on death, removal from the District, or other disability of a juror, resealing the box, that names be not placed again in the box for two years, and for failure of persons selected to attend. Then, in section 863, provision is made to complete the panel in the following language:

> SEC. 863. If at any time there should not be, by reason of challenge or otherwise, a sufficient number of jurors to make up the panel, the court shall order the marshal to summon as many talesmen as are necessary for that purpose.

This section, 863, was amended by the act of March 1, 1889 (25 Stat., 750, sec. 9; 2 Supp. R. S., 652), to read as follows:

> If at any time during the impaneling of a jury *in any other than a capital case the regular panel*, by reason of challenge or otherwise, shall be exhausted before the jury is complete, the court may in its discretion direct the clerk to draw from the box the names of other persons to serve as jurors and cause them to be summoned, or order the marshal to summon as many talesmen as may be necessary to complete the jury.

Said sections 857 and 863, as amended, are designated as sections 7 and 15 of chapter 36 of Abert's compilation of statutes in force in the District, pages 303 and 304.

That said section 863, as amended, and section 209 of the District Code are identical will at once be noted upon comparison.

In carrying the provisions of sections 851 to 856, inclusive, and 858 to 863, inclusive, Revised Statutes relating to the District of Columbia, into chapter 1, subchapter 3, sections 198 to 217, inclusive, of the District Code, the provisions contained in section 857, Revised Statutes relating to the District of Columbia, providing for the completion of juries in capital cases, were omitted.

The Revised Statutes of the United States relating to the District of Columbia were expressly repealed by the District Code, section 1636, which provides that—

> All acts and parts of acts of the general assembly of the State of Maryland general and permanent in their nature, all like acts and parts of acts of the legislative assembly of the District of Columbia, and *all like acts and parts of acts of Congress applying solely to the District of Columbia in force in said District on the day of the passage of this act are hereby repealed, except:*

and then names nine exceptions. The nine exceptions are all of acts of Congress other than the Revised Statutes of the United States relating to the District of Columbia.

The former acts of Congress regulating the selection of petit jurors in the District of Columbia were specially enacted for, and given exclusive operation in, the District, *and were repealed by the District Code.* (*Clark* v. *The United States*, 19 App. D. C. 295, 308, 311.)

It was probably through oversight on the part of the compilers of the District Code that a provision

for completion of juries in capital cases corresponding to section 857, Revised Statutes for the District of Columbia, was not included. It is submitted that the situation as to the legality of the petit jury that tried the defendant is identical with that of the grand jury in the *Clark case, supra*.

It is therefore respectfully submitted that, for the errors appearing in this case, the judgment of the Court of Appeals of the District of Columbia should be reversed, with directions to reverse the judgment of the Supreme Court of the District of Columbia, and grant a new trial.

PACA OBERLIN,
JOSEPH SALOMON,
THOMAS M. BAKER,
Attorneys for Arthur Johnson.

APRIL, 1912.

○

No. 1075

In the Supreme Court of the United States

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER,

vs.

THE UNITED STATES.

On writ of certiorari to the court of appeals of the District of Columbia.

BRIEF FOR THE UNITED STATES.

SUBJECT INDEX, AUTHORITIES AND REFERENCES.

40982—12——1

In the Supreme Court of the United States.

OCTOBER TERM, 1911.

ARTHUR JOHNSON, PETITIONER,
v.
THE UNITED STATES. } No. 1075.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR THE UNITED STATES.

STATEMENT OF THE CASE.

The petitioner, Arthur Johnson, was convicted of the crime of murder in the first degree in the Supreme Court of the District of Columbia, and sentenced to be hung for his offense. (R., 4, 5.) The judgment against him was affirmed by the Court of Appeals of the District (R., 15–24), and he thereupon applied to this court for a review of his case, on certiorari, an application concurred in by the Government and granted by the court.

Three questions are presented by the record, two purely and extremely technical, the other substantial and of the gravest consequence.

The substantial question is: May the jury in the District of Columbia, in a case of murder of the first degree, qualify their verdict of guilty by adding the words "without capital punishment?"

The technical questions relate to the arraignment of the defendant and to the empanelling of the jury.

THE ARGUMENT.

I.

The qualified verdict.

The Criminal Code of the United States now in force was approved March 4, 1909, and became effective January 1, 1910.

Section 330 of that code provides:

> In all cases where the accused is found guilty of the crime of murder in the first degree, or rape, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment for life.

The Supreme Court of the District held that this provision was not applicable to the District of Columbia, and denied to the prisoner the possibility of a verdict thus qualified. Manifestly, if this holding was wrong the judgment should be reversed.

The District Court held that the case was governed by the "Code of law for the District of Columbia," approved March 3, 1901, and made effective January 1, 1902.

This code provides, in section 801, that "the punishment of murder in the first degree shall be death by hanging," and makes no provision for a qualified verdict.

The Criminal Code is the later enactment of Congress, but it is a general code, dealing with the entire United States, except as its operation is restricted by its own terms.

The District Code was designed specially and only for the District of Columbia, but it is not a complete and comprehensive code of law, but is supplemented, as its first section provides, by the common law, certain British statutes, the principles of equity and admiralty, and "all general acts of Congress not locally inapplicable in the District of Columbia, and all acts of Congress by their terms applicable to the District of Columbia and to other places under the jurisdiction of the United States, in force at the date of the passage" of the code and not inconsistent therewith or replaced by some provision of the code.

Section 1639 of the District Code, one of its repeal provisions, prescribes:

> The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to

> have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith.

Manifestly, the provision of the District Code must prevail over any inconsistent provision of any general law in force at the time of the passage of the code.

Prior to the passage of the code of 1901 the question under discussion was governed by general law, for the District Code theretofore existing did not deal with the subject.

Most of the penal laws enacted by Congress relate to offenses peculiarly against the Federal sovereignty, and not to matters of domestic police. These laws are operative alike in the States, Territories, and Districts, wherever the Government of the United States has jurisdiction.

There are other laws, however, enacted by Congress in virtue of the admiralty and maritime and territorial jurisdiction, and these are related to matters of domestic and local police. Here the jurisdiction of the United States is comprehensive; and there is no division of sovereignty with a State. Congress may establish a Territory in the formal sense and vest the power of domestic police in a territorial legislature, giving to the people of the Territory local self-government, or it may itself exercise that power, as it does in the District of Columbia and in Alaska, and places in the States and Territories within the exclusive jurisdiction of the United States. We will speak of this as the territorial jurisdiction of the

United States, for we have no occasion here to distinguish between that and the admiralty and maritime jurisdiction.

In the exercise of this territorial jurisdiction Congress enacted laws defining offenses and providing for their punishment, but did not attempt a comprehensive local penal code. These laws will be found in chapter three of Title LXX of the Revision of 1873, 2d edition. They relate to the offenses of murder, manslaughter, rape, maiming, and a number of others not necessary to be enumerated. To cover cases not specifically provided for it was enacted by section 5391 that—

> If any offense be committed in any place which has been or may hereafter be, ceded to and under the jurisdiction of the United States, which offense is not prohibited, or the punishment thereof is not specially provided for, by any law of the United States, such offense shall be liable to, and receive, the same punishment as the laws of the State in which such place is situated, now in force, provide for the like offense when committed within the jurisdiction of such State; and no subsequent repeal of any such State law shall affect any prosecution for such offense in any court of the United States.

This chapter applied to the District of Columbia as being a "place or district of country under the exclusive jurisdiction of the United States." Sec. 5339.

This chapter, by section 5339, denounced the crime of murder, and provided that the person guilty

"shall suffer death." It did not define the offense, nor did it recognize any degrees of criminality. This was the law of the District of Columbia until the code of 1901 was enacted.

The same chapter, section 5345, denounced the crime of rape and visited it with the penalty of death. This was not the law of the District of Columbia, for section 1152 of the Revised Statutes of the District of Columbia, 1875 edition, punished rape, the first offense with imprisonment for from ten to thirty years, and the second offense with imprisonment for life.

The act of January 15, 1897, 29 Stat. 487, reduced the cases in which the penalty of death might be inflicted, limiting it to the crimes of treason, murder, and rape, and offenses under the Articles for the Government of the Army and the Navy.

This act also provided for the qualified verdict in cases of murder and rape, as follows:

> * * * That in all cases where the accused is found guilty of the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto "without capital punishment;" and whenever the jury shall return a verdict qualified as aforesaid the person convicted shall be sentenced to imprisonment at hard labor for life.

This act did not apply to the District of Columbia so far as concerned the crime of rape, for that crime in the District of Columbia was not capital and was

punishable by imprisonment for not less than ten nor more than thirty years. Compiled Statutes in force in the District of Columbia, 1894, page 160.

The act did apply to the District of Columbia so far as concerned the crime of murder, for that crime was punishable under section 5339 of the Revised Statutes. This was determined in *Winston* v. *United States*, 172 U. S. 303.

The general law of the United States was thus the law of the District of Columbia and continued to be until the enactment of the District Code of 1901.

That code defined the crime of murder, established degrees of the offense, and prescribed the punishment for each degree. The sections of the code in question are as follows:

> SEC. 798. MURDER IN FIRST DEGREE.—Whoever, being of sound memory and discretion, purposely, and either of deliberate and premeditated malice or by means of poison, or in perpetrating or in attempting to perpetrate any offense punishable by imprisonment in the penitentiary, kills another, is guilty of murder in the first degree.
>
> SEC. 799. Whoever maliciously places an obstruction upon a railroad or street railroad, or displaces or injures anything appertaining thereto, or does any other act with intent to endanger the passage of any locomotive or car, and thereby occasions the death of another, is guilty of murder in the first degree.
>
> SEC. 800. MURDER IN SECOND DEGREE.—Whoever with malice aforethought, except as

provided in the last two sections, kills another is guilty of murder in the second degree.

SEC. 801. PUNISHMENT.—The punishment of murder in the first degree shall be death by hanging. The punishment of murder in the second degree shall be imprisonment for life, or for not less than twenty years.

This code also changed the law as to rape, as follows:

SEC. 808. RAPE.—Whoever has carnal knowledge of a female forcibly and against her will, or carnally knows and abuses a female child under sixteen years of age, shall be imprisoned for not less than five nor more than thirty years: *Provided*, That in any case of rape the jury may add to their verdict, if it be guilty, the words, "with the death penalty," in which case the punishment shall be death by hanging: *Provided further*, That if the jury fail to agree as to the punishment, the verdict of guilty shall be received and the punishment shall be imprisonment as provided in this section.

A necessary result of enacting this code was that the provision as to the qualified verdict made by the act of January 15, 1897, ceased to apply to the District.

The provisions of the code were inconsistent with those of the general law, and the code was at once a later and a special act. Moreover, the act of 1897 is in terms limited to convictions of "the crime of murder or of rape under sections fifty-three hundred and thirty-nine or fifty-three hundred and forty-five,

Revised Statutes," while convictions in the District were necessarily under the District Code.

There was no change of the law for eight years, and administration of it in the District was in accordance with the view we have expressed, and there never was challenge of its propriety. There were a number of trials for and convictions of murder in the first degree, and the death penalty was imposed in such cases.

The law of the District was thus, and apparently by deliberate design, made more severe than the general law.

It may be noted in passing, too, that a quite comprehensive code for Alaska was enacted March 3, 1899, and that this code established degrees of murder and provided for a qualified verdict in cases of murder of the first degree. Carter's Annotated Alaska Codes, page 2, sections 3 and 4.

Whatever the reason, the law of the District of Columbia was now exceptional in this respect.

Meanwhile a commission had been at work "to revise and codify the criminal and penal laws of the United States." It was provided for by the act approved June 4, 1897, 30 Stat. 11, 58, but did not make its final report until December 15, 1906. The first consequent action by Congress was the Criminal Code approved March 4, 1909, and now in force. This Commission framed the Alaskan Code but not that of the District of Columbia.

We have now to consider the general Criminal Code, and to determine its effect upon the code of the District.

The first ten chapters are applicable to the District of Columbia just as they are to the States, Territories, and other Districts. And the same is true of chapter twelve. These chapters deal with offenses Federal in their nature.

Chapter thirteen relates to territorial jurisdiction. It deals with certain offenses "when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." The offenses dealt with are the circulation of obscene literature, polygamy, etc., bull fighting, prize fighting, and train robberies—subjects of domestic or local police.

The District Code dealt with these and similar offenses, except train robbery, viz: Section 870, bigamy; 871, seduction by teacher; 872, indecent publications; 873, seduction; 874, adultery; 875, incest; and 876, with prize fighting and bull fighting.

The corresponding sections of the District and Criminal Codes are by no means identical; there being sometimes differences in the description of the offense and always in the punishment prescribed.

Chapter thirteen of the Criminal Code applies to the District of Columbia, and where inconsistent therewith supersedes the District Code.

There seems to be no room for doubt of this. The offenses defined are to be punished as prescribed

"when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States." Sec. 311. The District of Columbia comes within this description. Then we find in section 319 that "the provisions of this section shall apply only within the Territories of the United States," and in section 320 that "the provisions of this section shall apply only within the Territories of the United States and the District of Columbia."

And this was intended by the commission. In their final report, made in 1906, and published in that year, they present in volume 2, pages 1840 to 1842, a chapter thirteen. This contains provisions as to intimidating voters, conspiring to deprive any person of the equal protection of the laws, and gambling, not contained in the chapter as adopted. As to the offenses which are contained in the code as adopted, the sections, with slight and absolutely immaterial verbal differences, are the same in both. Section 9026 of the report, page 1842, provides:

> The offenses defined in this chapter shall be punished as herein provided when committed within Alaska, Arizona, Hawaii, New Mexico, Porto Rico, and the District of Columbia, notwithstanding the word "Territory" alone is used in several sections of this chapter.

The difference between the law as reported and as enacted is that the law enacted in its description of jurisdiction is not so detailed but is more comprensive.

Chapter thirteen of the Criminal Code is then applicable to the District of Columbia, and it can not be said broadly that in the enactment of the Criminal Code there was no purpose to deal with or modify the District Code in any respect.

We think it equally clear that chapter eleven of the Criminal Code was not intended to apply to the District of Columbia.

In their report of 1906 the commission say, vol. 1, page 110:

> "In the revision of this chapter we have deemed it important to define with the greatest attainable precision the places within which the jurisdiction of the United States over crimes shall be exercised."

The definition adopted will be found in volume 2, page 1829, and is as follows:

> SEC. 8929. The crimes and offenses defined in this chapter shall be punished as herein prescribed:
>
> *First.* When committed within the admiralty and maritime jurisdiction of the United States and out of the jurisdiction of any particular State on—
>
> (*a*) The high seas, the seas bordering on the United States within a distance of one marine league from the shore, or on any river, haven, creek, basin, or bay immediately connected with such seas;
>
> (*b*) Lake Michigan and the Straits of Mackinaw; and the waters of Lake Superior, Saint Mary's River, Lake Huron, River Saint Clair, Detroit River, Lake Erie, Niagara River,

Lake Ontario, River Saint Lawrence, and the Rio Grande Del Norte River, to the middle of such waters;

(*c*) Any vessel owned in whole or in part by the United States or any citizen thereof, or any corporation created under the laws of any of the States thereof; or—

Second. When committed within or on—

(*a*) Any fort, arsenal, dockyard, magazine, other needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States; or

(*b*) On any island, rock, or key containing deposits of guano which may, at the discretion of the President, be considered as appertaining to the United States.

The words "or other place under the exclusive jurisdiction of the United States" might be construed broadly enough to include a district or Territory, but this was not the intention. What the commission did intend is shown by its report, pages 97 and 98:

> "To gain a clear understanding of what is needed in a Federal code of crimes and punishments, it is fundamentally important to take into account what may be called the territorial jurisdiction of the United States. Paragraph 17 of section 8, Article I of the Constitution, gives Congress power 'to exercise like authority (that is, "exclusive legislation in all cases whatsoever") over all places purchased by the consent of the legislature of the State in which the same shall be for the erection of

forts, magazines, arsenals, dockyards, and other needful buildings.'

"It was decided by Mr. Justice Story in United States v. Cornell (2 Mason, 60), that 'exclusive jurisdiction is attendant upon exclusive legislation.' The condition that this involves is that a crime committed within any area acquired under the above provision must be punished by the United States or it cannot be punished at all. It is now well established that there are no common-law crimes against the United States, and it follows that every offense must be defined and the penalty prescribed by law.

"The Constitution specifies forts, magazines, arsenals, and dockyards, and then adds 'other needful buildings.' Among the latter are the post-offices, custom-houses, and court-houses, that the Government has erected in all the larger cities of the Union. * * * It follows that the United States is chargeable with the prosecution and the punishment as well of the slightest misdemeanor as of the gravest felony there committed.

"*But the method prescribed by the paragraph of the Constitution above quoted is not the only one by which the United States may acquire territorial jurisdiction. It may become possessed of land for other purposes than those there specified, or it may retain jurisdiction over tracts of the public domain for military reservations or other uses.*"

The intention was simply to include the places acquired in the manner described in the last paragraph of the quotation.

This is made plainer by the report of the commission, as amended by the joint committee of Congress and published in 1908. The third paragraph of section 8900 of this report provides:

> Third. *When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard or other needful building.*

In this form it was reported to Congress and was enacted into law. Paragraph third of section 272 of the Criminal Code. It took the place of section 5339 of the Revision of 1873, the language of which was "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States."

The new law obviously restricted this territorial jurisdiction, and there was a reason for so doing.

Chapter eleven deals with offenses of the kind subject to the jurisdiction of the States severally, where there are States—offenses not distinctively Federal in character, but subjects of local or domestic police.

The Territories provided their own laws for such cases, just as the States did, and Congress had by distinct enactments made provision alike for the District of Alaska and for the District of Columbia; and it was not disturbing these special provisions.

That Congress intended only to deal with matters of local police in this restricted territorial jurisdiction is made manifest by section 289:

> Whoever, within the territorial limits of any State, organized Territory, or District, but within or upon any of the places now existing, or hereafter reserved or acquired, described in section two hundred and seventy-two of this act, shall do or omit the doing of any act or thing which is not made penal by any law of Congress, but which if committed or omitted within the jurisdiction of the State, Territory, or District in which such place is situated, by the laws thereof now in force would be penal, shall be deemed guilty of a like offense and be subject to a like punishment; and every such State, Territorial, or District law shall, for the purposes of this section, continue in force, notwithstanding any subsequent repeal or amendment thereof by any such State, Territory, or District.

This was plainly designed to apply the law of a State, Territory, or District to places to which it would not otherwise attach. True, this was not necessary as to a District like that of Columbia or Alaska, over which Congress had plenary and exclusive jurisdiction, but it was as to States and Territories, and might become so as to Districts under conditions arising hereafter.

Counsel for petitioner cite a case in the Supreme Court of the District in which Judge Anderson

reached a different conclusion, but how? By changing the law. As enacted by Congress the law reads:

> When committed within or on any lands reserved or acquired for the exclusive use of the United States and under the exclusive jurisdiction thereof.

The judge repeats the words "any lands," as we will indicate by italics, and so makes the section read:

> When committed within or on any lands reserved or acquired for the exclusive use of the United States, and *any lands* under the exclusive jurisdiction thereof.

This interpolation gives to the last clause of the sentence an extensive instead of a restrictive effect, but there is absolutely no warrant for the interpolation.

We conclude that chapter eleven did not repeal sections 798 to 801 of the District Code defining the crime of murder and prescribing the punishment therefor, but left them unimpaired as the law of the District.

This leaves chapter fourteen, the one containing the provision for a qualified verdict. It is entitled "General and special provisions." The special provisions are sections 328 and 329, which relate to offenses by Indians or on Indian reservations, and are of no significance in this discussion.

Sections 323 to 327 are precise copies of sections 5325 to 5328 and 5330 of the Revision of 1873. These sections of the Criminal Code are the law of the

District of Columbia and the corresponding sections of the Revision were so long before the District Code was adopted, and the District Code contains nothing inconsistent with any of them. Indeed, the law would be as it is if these sections were all repealed, as was the old provision, 5329 of the Revision, resepcting benefit of clergy. These provisions are merely declaratory, or they prohibit something which, if it can be done at all, can be done only under the sanction of an affirmative statute. There is nothing in it all indicating a purpose to amend the Code of the District.

Sections 331 and 334 had their counterparts, almost exact, in sections 5340 and 5324 of the Revision. They relate, the one to a disposition of the bodies of criminals who have been executed and the other to accessories to piracy. Neither subject is dealt with by the Code of the District of Columbia, and these sections are law in the District, made so by the Revision of 1873 and of course not restricted in their scope because of a purely formal amendment.

Section 332 makes principals of accessories before the fact. They were already so under the Code of the District. Section 333 prescribes a measure or standard of punishment for accessories after the fact. This had been done by the District Code. The commission in these sections were amending not the District Code but the Revised Statutes. They say in their report of 1906, pages 118–119:

> "In accordance with the policy of recent legislation those whose relations to a crime

would be that of accessories before the fact according to the common law are made principals. Accessories after the fact are made subject to one-half of the term of imprisonment or fine imposed upon principals, or where the principal is punishable by death, then the penalty for an accessory is fixed at imprisonment for not more than ten years. Chapter 8 of Title LXX, Revised Statutes, makes accessories after the fact to murder, robbery, or piracy punishable by imprisonment for not more than three years; to robbery of a mail carrier by imprisonment not more than ten years, and to stealing from the mails by imprisonment not more than five years. There is a manifest inconsistency in these penalties which we have here sought to reform. By the common law there are no accessories after the fact to misdemeanors. Congress has in numerous instances expressly declared certain offenses to be misdemeanors to which it has nevertheless attached the penalty of imprisment for long terms of years. It would seem just that those who harbor or aid in the escape of such offenders should not enjoy immunity, and a provision is reported for the punishment of accessories after the fact to all offenses."

And the joint committee of the House and Senate in their report to their respective Houses set out the existing law and the law as they propose to make it, section by section, on opposing pages, and turning to pages 356 and 357 we find on page 356 the sections of the proposed law, there numbered

329 and 330, and on page 358, sections 5323, 5427, 5533, 5534, and 5535 of the Revision as the existing law which is to be changed. Senate Reports (Public), vol. 3, 60th Congress, 1st session, 1907–08. Section 333 deals with venue in cases of murder and manslaughter and is an amendment of sections 5339 and 5341 of the revision.

There are new sections in the chapter, those from 337 to the close, relating to the construction of the chapter, but no rule is laid down which is of any significance here, unless it be that of section 339, declaring that the arrangement and classification of the title has been for purposes of order and convenience, and that a legislative construction is not to be inferred therefrom.

The remaining sections of the chapter are two, section 330, which provides for the qualified verdict, and 335, which provides:

> All offenses which may be punished by death, or imprisonment for a term exceeding one year, shall be deemed felonies. All other offenses shall be deemed misdemeanors.

This is an entirely new section. It does not amend any section of the Revision or any section of the District Code. From its very nature it is a general provision of Federal jurisprudence. Applicable to the District of Columbia it must be, for the great body of the general Federal Criminal Code is applicable here, and the provision defining felonies and misdemeanors is not one susceptible of being split in the District as between those offenses which are Federal

in their nature and those which are Federal only because of the territorial jurisdiction.

Section 330, authorizing the qualified verdict, stands upon a different footing. It deals with the measurement of punishment that may or must be meted out for an offense. This is not necessarily the same throughout the jurisdiction of the United States. In fact, until the Criminal Code took effect, and for some years prior to that time, we had one rule for the District of Columbia, another for the District of Alaska, and another for the remainder of the United States. In the United States at large the act of 1897 provided for the qualified verdict in any case of murder and permitted the death penalty in any case. In the District of Columbia two degrees of murder were recognized, the first punished inexorably with death and the second entirely exempted from that penalty. In Alaska there were two degrees of the crime, the second being exempt from punishment by death and a qualified verdict being authorized for the first degree.

Which of these laws was section 330 designed to amend? The joint committee of the House and Senate report it as an amendment of the act of 1897. (Pages 356 and 357 of the report.)

And verbally the new section is not adapted to amend the provisions of the Code of the District. The amendment assumes that the penalty affixed by law to murder in the first degree and to rape is death. So it was under the Revision, but not in the District of Columbia. In the District the punishment for rape was a long term of imprisonment, but it was pro-

vided by section 808 that the jury might inflict the death penalty. Unless they did, the punishment would be imprisonment. No authority to remit the death penalty was necessary here.

In so far as the Criminal Code deals distinctively with the territorial jurisdiction of the United States, and this matter comes under that head, its application to the District of Columbia is made clear whereever that is intended. This is in chapter thirteen, and only therein.

When the Criminal Code, in chapter fourteen, refers under its "general provisions" to the crimes of murder and rape, it must, unless there is some express statement otherwise, have reference to them as otherwhere dealt with in the same code. These crimes are dealt with only in chapter eleven, and in virtue of the territorial or admiralty jurisdiction of the United States. We have undertaken to show that the territory to which the chapter applies does not include any organized territory or district, or any place, indeed, which may provide its own code of domestic police, or for which a distinctive code may be provided by Congress.

The repealing chapter of the Criminal Code gives support to our view. It is very elaborate, covering seven large printed pages. It specifically repeals hundreds of sections of the Revised Statutes, and sixty different acts or parts of acts. It does not ignore the District of Columbia, for on page 74 it repeals "'An act to prohibit prize fighting and pugilism and fights between men and animals, and to provide

penalties therefor in the Territories and the District of Columbia,' approved February twenty-seventh, eighteen hundred and ninety-six." In none of the repealing sections, however, is there any reference to the Code of the District or to any section of it.

Nothing is to be inferred from the fact that as a result of our construction the Code of the District differs as to the same offenses from the general law. Such differences resulted from the very enactment of the District Code. It made its own definitions of offenses and prescribed its own punishments, and, as we have seen, on the subject under consideration differed at once from the Alaskan Code, adopted in 1899, and from the general law of the United States.

The Commission to Revise and Codify the Criminal and Penal Laws of the United States was appointed under the act of June 4, 1897, and they conceived their duty to be related to the general laws and not to those of any particular Territory or district. They state in their report of 1906, page 1, that—

> * * * The duties of the Commission were from time to time increased and extended until its labors comprehended a complete revision of all the permanent and general laws of the United States. *Almost at the threshold of its work on the criminal and penal laws the Commission was required by a resolution of Congress (Cong. Rec., Vol. 31, p. 5368), to prepare a code of civil and penal laws for the District of Alaska*, which was completed, reported,

and enacted by Congress during the years 1899 and 1900 (30 Stat., 1253; 31 Stat., 321).

On the 3d of March, 1899, Congress further extended the duties of the Commission by providing that the Commission should—

"Revise and codify the laws concerning the jurisdiction and practice of the courts of the United States, including the judiciary act, the acts in amendment thereof and supplementary thereto, and all acts providing for the removal, appeal, and transfer of causes (30 Stat. L., 1116)."

On the 3d of March, 1901 (31 Stat. L., 1181), Congress further extended the duties of the commission by directing it "to revise and codify," in accordance with the terms and provisions of the act authorizing its creation—

"All laws of the United States of a permanent and general nature in force at the time the same shall be reported. That in performing this duty the said commission shall bring together all statutes and parts of statutes relating to the same subjects, shall omit redundant and obsolete enactments, and shall make such alterations as may be necessary to reconcile the contradictions, supply the omissions, and amend the imperfections of the original text; and may propose and embody in such revision changes in the substance of existing law; but all such changes shall be clearly set forth in an accompanying report, which shall briefly explain the reasons for the same. That the said commission shall arrange such revision under titles, chapters, and sections, or other suitable divisions and sub-

> divisions, with head notes briefly expressive of the matter contained in such division, and with marginal notes so drawn as to point to the contents of the text, and with references to the original text from which each section is compiled, and to the decisions of the courts of the United States explaining or construing the same; and shall provide by an index for any easy reference to every portion of such revision. That when the commission have completed such revision in accordance herewith, it shall cause a copy of the same, in print, to be submitted to Congress, that the statutes so revised and codified may be reenacted if Congress shall so determine.

The Code of Alaska was undertaken by the special requirement of Congress, but neither in any act of Congress creating or instructing the commission, nor in any statement of the commission as to the scope of the work is there any allusion to any code of the District of Columbia. Throughout the various reports of the commission which we have been able to find there is no word suggesting either revision of the District Code or repealing it and applying the general code to the District.

To the contrary, the commission, page 2 of the report of 1906, say:

> On the 15th of May, 1901, the Commission completed its revision of the criminal and penal laws and reported the same to the Attorney General, which was by him transmitted to Congress and in due course referred to the appropriate committees in the Senate and in

the House. A bill embodying the provisions of the report was introduced in the House, and upon reference was considered by the Committee on the Revision of the Laws during the session of the Fifty-eighth Congress, but no final action was taken thereon.

The District Code had a source of its own. It was the work of lawyers of the District who had in mind its peculiar needs, and Congress took it from their hands and enacted it into law for the government of the District. It has been recognized as the District Code ever since, and from time to time at different sessions of Congress has been amended as such code.

When the commission to revise the general penal code made its report on May 15, 1901, the District Code had just been enacted, March 3, 1901, to take effect January 1, 1902. If the commission intended to repeal this code between the time of its enactment and the time of its taking effect, and to do this by the penal code submitted by them as a part of their report of May 15, 1901, they would have said so in that report, and said so plainly. But there is not a word of such purport to be found in their report, and the only allusion to the District is an implied statement at least that they are not proposing to disturb it. On page xxx of this report of 1901 we have:

CERTAIN OFFENSES IN THE TERRITORIES.

Sections 429, 430, "Intimidating, etc., voters," and "Conspiracy to deprive any person of the equal protection of the laws."

Sections 5507 and 5519, Revised Statutes, have been held to be unconstitutional as to the States, but the grounds upon which that conclusion is based do not extend to the Territories, which are subject to the direct legislation of Congress. These sections, with the proper limitations, are accordingly inserted in this chapter.

Section 431, "Polygamy:" This section is also inserted in the chapter, "Offenses within the territorial and maritime jurisdiction of the United States;" hence the words "or other place over which the United States have exclusive jurisdiction," are here omitted. The section is also embraced in "An act to establish a code of law for the District of Columbia," approved March 3, 1901.

Section 432, "Unlawful cohabitation:" The notes on the previous section are here applicable.

Section 440, "Prize fights, bull fights, etc.:" The words "or the District of Columbia" are omitted as this and the following section are embraced in the act to establish a code of law for the District of Columbia already mentioned.

This is everything relating specifically to the District or District Code. The report of the commission was not acted upon for some years, and the penal code presented by them was amended in some particulars before it was adopted, but it was not essentially changed in any respect, and not at all so far as would affect its relation to the Code of the District.

The history of the legislation shows that there was no purpose of securing uniformity throughout the territorial jurisdiction of the United States in the matter of local or domestic police. The Territories were empowered to make their own laws respecting such matters, and Congress enacted a distinct code for Alaska, another for the District of Columbia, and still another for the waters, lands, and places so carefully defined in chapter eleven of the general Criminal Code. Systems or codes of laws thus varied and varying we have had ever since the Alaskan Code was enacted. The amendment of one of them has not hitherto been taken as an amendment of the others. Well-settled principles of statutory construction preclude that an amendment of the general code be taken as an amendment of any of the special codes unless such a purpose is plainly expressed.

Murder in the first degree is defined by sections 798 and 799 of the District Code and by section 273 of the general code. The definitions are not the same. One marked difference is that killing, in the perpetration of or attempt to perpetrate any penitentiary offense, is by the District Code murder in the first degree. By the general code, killing is murder in the first degree when done in the perpetration of or attempt to perpetrate any arson, rape, burglary, or robbery. The District Code is more severe in its definition and so it is in its provision for punishment. A change in the definition of the District Code can not possibly be inferred from the change of definition in

the general code. If the provision for a qualified verdict in the general code were to be found in the eleventh chapter, there would be as little warrant for the inference that the District Code was changed in that respect. The case as to definition differs from that as to punishment only in that the provision as to the qualified verdict is to be found in the fourteenth chapter, relating to "general and special provisions," and we are told by this very chapter, in section 339, that "the arrangement and classification of the several sections of this title have been made for the purpose of a more convenient and orderly arrangement of the same, *and therefore no inference or presumption of a legislative construction is to be drawn by reason of the chapters under which any particular section is placed.*"

We see no escape from the conclusion that Congress in adopting the general penal code did not intend to, and did not in fact, apply it to the District of Columbia, saving and excepting only chapter thirteen, which was made expressly applicable.

II.

The arraignment.

The record of the trial court as to the arraignment is in proper form. The recital is as follows (p. 2):

Arraignment.

Supreme Court of the District of Columbia.

FRIDAY, MARCH 10TH, A. D. 1911.

The Court resumes its session pursuant to adjournment, Mr. Justice Wright presiding.

* * * * *

> Come as well the attorney of the United States as the defendant, in proper person, in custody of the warden of the United States jail in and for the District of Columbia, and by his attorney T. M. Baker, Esquire; and, thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country and the attorney of the United States doth the like.

It is sought to impeach this by affidavit of prisoner's counsel, which is simply to the effect that at his arraignment the prisoner waived the reading of the indictment. He was attended by counsel at the time, and it is not made to appear in any way that he was not fully advised of the nature and cause of the accusation, or that his plea of "not guilty" was not intelligently made.

The affidavit of counsel does not preclude the fact that the prisoner had a copy of the indictment and that its purport was fully and clearly stated to him at the time, which would serve every purpose of the law much better than a formal reading. The affidavit states that certain things were done, basing this statement upon the observation of counsel, and then proceeds to say that "*there is no record* of anything other or further being done as to arraignment of of defendant" (R. 5). In other words, the record is appealed to as conclusive that nothing was done in so far as it is silent, and inconclusive, and subject to impeachment by affidavit in so far as it spe affirmatively.

This will not do. If the record is to be impeached by affidavit, then all the facts must be shown. The case of *Crain* v. *United States*, 162 U. S. 625, does not go to the extent of holding that the mere reading of the indictment may not be waived in any case when the accused is otherwise informed of the charge against him and pleads thereto intelligently. Neither does any other case cited by counsel. It is held in *Crain's* case, page 637, that "in capital or other infamous crimes an arraignment has always been regarded as a matter of substance." But this is not to say that there is no arraignment simply because there is no formal reading of the indictment. Indeed, the court in *Crain's* case, page 637, said: "According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, *and informed of the charge against him*, is, the 'demanding of him whether he be guilty or not guilty,'" etc. And the requirement of the Constitution is not that the indictment be formally read, but that the accused "be informed of the nature and cause of the accusation." *Crain's* case is an extreme one, and was dissented from by three judges as proceeding "upon the merest technicality"; but even that case does not hold that an arraignment meeting every requirement of the law is insufficient if so be it the indictment is not formally read at the time of taking the plea, and, on the contrary, the court, page 643, quotes Bishop, with approval, to the effect that "with the consent of the court the prisoner may waive the reading of the indictment, though without waiver it

will be read, even where he has been furnished with a copy." 1 Bishop's Crim. Proc., sec. 733.

The recital of the record, however, is to be taken as conclusive, sustained as it is by the action of the trial court in accepting it as against the affidavit of counsel.

In *Evans* v. *Stettnisch*, 149 U. S. 605, l. c. 607, it was said:

> * * * The record imports absolute verity; the affidavit of a witness does not; and when the court, which, in addition, may be supposed to have personal knowledge of the fact, sustains the recital in the record as against the statement in the affidavit, its ruling cannot on review be adjudged erroneous.

III.

Empanelling the jury.

Objection is made in this court to the manner of obtaining jurymen after the regular panel had been exhausted by challenges and excuses.

It is not suggested that any incompetent person was placed upon the jury list.

No objection was made by the defendant at the time to the way in which the list was filled. The persons called were examined upon their *voir dire*, and the only objection of any kind made in the course of the examination had reference to the matter of the qualified verdict.

There was no allusion to this in the motion for new trial and in arrest of judgment.

It was not assigned as error in the Court of Appeals of the District on the hearing of the case in that tribunal.

The objection is made here for the first time.

The particular manner in which a deficiency in the regular jury panel is supplied, when every man called is a competent juror, and the resulting jury which tries the case is an impartial jury of the district wherein the crime was committed, involves nothing in the nature of a constitutional right and nothing which, if irregular in any manner, may not be validated by the consent of the accused.

The contention, as we understand it, moreover, is not that any provision of law with regard to the empanelling of the jury was violated, but that "through oversight on the part of the compilers of the District Code a provision for completion of juries in capital cases corresponding to section 857, Revised Statutes for the District of Columbia, was not included"; and so, as stated by counsel, "as to completion of a jury to try a capital case, there is an entire absence of statutory authority for impanelling." This being so, there could be no trial at all. The regular panel drawn for service at any term of the court is, under section 204 of the District Code, to consist of twenty-six persons, and as under section 918 the defendant has twenty peremptory challenges, he could forever prevent a trial. But the court has inherent power to meet a contingency like this and is not dependent upon an express statute for authority to supply deficiencies in the panel created by challenges or excuses.

The court here pursued a method that was usual, and which drew for the panel only such persons as had been previously put upon the general jury list of the District in the manner and by the officials appointed by the Code of the District, section 198. This, without the approval of the defendant, was right, and, done with his approval, cannot be the subject of complaint.

If, however, the men thus called to fill the panel were not competent to serve, then they were subject to challenge for cause, and the cause of course was known to defendant at the time. Section 919 of the District Code provides:

> No verdict shall be set aside for any cause which might be alleged as ground for challenge of a juror before the jury are sworn, except when the objection to the juror is that he had a bias against the defendant such as would have disqualified him, and such disqualification was not known to or suspected by the defendant or his counsel before the juror was sworn.

Any right the defendant could possibly have as to the manner of filling the panel is statutory and not constitutional, and the statute could properly provide, and here has done so, the time when that right must be asserted or held to be waived.

The objection to the jury is utterly wanting alike in merit and in timeliness.

It is respectfully submitted that the judgment herein should be affirmed.

F. W. LEHMANN,
Solicitor General.

APRIL, 1912.

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JOHNSON *v.* UNITED STATES.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 1075. Argued May 1, 2, 1912.—Decided June 7, 1912.

Whether the prisoner was properly arraigned is not a matter of form but of substance, and should be shown by the record. *Crain* v. *United States*, 162 U. S. 625.

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment; but so far as it is expressed it has a definite meaning.

Where a word is used as comprehensively descriptive of certain acts, it can be used in the record of a case as showing the performance of those acts; and so *held* as to "arraignment" as used in § 1032, Rev. Stat.

In this case what was done, as shown by the record, did constitute an arraignment.

The record in a case imports verity and cannot be contradicted by affidavits. *Evans* v. *Stettnisch*, 149 U. S. 605.

As used to define the place where a crime may be committed the words, "within any fort, arsenal, dockyard, magazine, or any other place or district of country under the exclusive jurisdiction of the United States" include the District of Columbia.

The act of January 15, 1897, 29 Stat. 487, c. 29, permitting the jury in a capital case of murder or rape under § 5339 or § 5345, Rev. Stat., to qualify the verdict by adding "without capital punishment" was applicable to the District of Columbia until superseded by the special provisions on the same subject in the District Code. *Winston* v. *United States*, 172 U. S. 303.

In framing a new statute a change of language from that of a former statute on the same subject is some evidence of a change of legislative purpose.

Some of the provisions of the Criminal Code approved March 4, 1909, 35 Stat. 1088, c. 321, apply to the District of Columbia and other provisions do not.

Congress in enacting the District Code recognized the expediency of separate provisions for the District of Columbia.

The provisions of the Criminal Code which deal with offenses Federal in nature, wherever committed, whether in places under Federal,

state or territorial control, supersede the District Code; provisions, however, in regard to offenses under state jurisdiction if committed in a State or over which Congress has given local control to the Territories, and in regard to which it has adopted a separate code as for Alaska, do not supersede the District Code.

The provision in § 272 of the Criminal Code of 1909 permitting the jury to qualify the verdict of guilty in certain cases punishable by death by adding "without capital punishment" does not supersede the provisions in the District Code in regard to punishment for murder.

Provisions in earlier statutes in regard to matters which are embraced in and superseded by a later statute are repealed by the later statute; but where the two statutes have definite territorial operation, they can exist together and the earlier one is not repealed or affected by the later.

An objection that the jury was not lawfully drawn must be availed of at the trial; it cannot, under § 919 of the District Code, be made the basis for setting aside the verdict on appeal.

38 App. D. C. 347, affirmed.

THE facts, which involve the validity of a conviction and sentence for murder in the District of Columbia, are stated in the opinion.

Mr. Paca Oberlin and *Mr. Thomas M. Baker* (by special leave of the court), with whom *Mr. Joseph Salomon* was on the brief, for petitioner:

A defendant in a capital case cannot waive anything essential. *Crain* v. *United States*, 162 U. S. 625. See, also, *Hill* v. *People*, 16 Michigan, 351; *Cancemi* v. *People*, 18 N. Y. 128.

Reading of an indictment is necessary in all criminal cases unless waived and in a capital case it cannot be waived, and the record in such a case which is silent on that point is the same in legal effect as if it recited that reading was waived, or indictment not read, and if either be true the record is fatally defective. *Crain* v. *United States, supra.*

In capital and other infamous crimes both the arraign-

ment and plea have always been regarded as a matter of substance and must be affirmatively shown in the record. *Crain* v. *United States, supra.* This is so well established that the condition should not be disturbed. Informed of the nature of the offense means reading the indictment.

Section 330 of the Criminal Code, authorizing the jury, in capital cases, to add to their verdict "without capital punishment," applies to the District of Columbia.

Prior to January 1, 1902, the date the District Code became effective, § 5339, Rev. Stat. was the statute under which the offense of murder was prosecuted. *Winston* v. *United States,* 172 U. S. 303; *United States* v. *Guiteau,* 1 Mack. 498.

An act entitled "An act to reduce the cases in which the death penalty may be inflicted," approved January 15, 1897, 29 Stat. 487, was held to be in force in the District of Columbia. *Winston* v. *United States, supra.*

The District Code, in §§ 798, 799, 800, prescribes what constitutes murder in the first and second degrees. Section 801 prescribes that punishment of murder in the first degree shall be death by hanging, and that of murder in the second degree, imprisonment for life or for not less than twenty years.

Section 272 of the Criminal Code is, in part, substantially a reënactment of that portion of § 5339, Rev. Stat., as to the commission of murder in any "place or district of country under the exclusive jurisdiction of the United States"; two degrees of murder are provided for in both the District Code and Criminal Code; and the language of § 330 of the Criminal Code is almost identical with that of the act of January 15, 1897, which was held to be in force in the District of Columbia.

Inconsistency between § 330 of the Criminal Code and previous statutes, for the purpose of preventing that section from being in force in the District, must be such as clearly exhibits an intent on the part of Congress not to

give the people of the National Capital the benefits of the law.

From early times it has been true that whenever there was a statute in favor of life or liberty that construction has been adopted by the courts which would cause it to operate in all places where it could so operate. A general act, prescribing the punishment of a specific offense throughout the State, operates as a repeal of a public local act prescribing a different punishment for a particular locality. *Nusser* v. *Commonwealth*, 25 Pa. St. 126; *People* v. *Jaehne*, 103 N. Y. 182.

An act changing the punishment only is not inconsistent with a failure to modify the elements of the crime also, especially when the punishment is made less. *Commonwealth* v. *Wyman*, 12 Cush. 237.

The rule of construction by which general acts of Congress are held to be applicable to the District of Columbia has been followed from the beginning. The Criminal Code contains nothing to indicate that this rule should be departed from.

Section 209 of the District Code, which expressly excepts capital cases, is the only provision in that code for the drawing of juries in criminal cases. The former acts of Congress regulating the selection of petit juries were repealed by the Code and § 209 is therefore the only statutory authority for completing juries; and as it expressly excepts capital cases the completing of the jury according to its provisions was reversible error.

The Solicitor General for the United States.

MR. JUSTICE MCKENNA delivered the opinion of the court.

Johnson was indicted, tried and convicted in the Supreme Court of the District of Columbia for the crime of murder for killing one Ofenstein, and sentenced to death.

He moved for arrest of judgment and for new trial on certain grounds which, among others, present three questions—(1) whether he had been properly arraigned; (2) the action of the court in giving and refusing instructions in regard to the power of the jury to add to their verdict, if they found him guilty of murder, the words "without capital punishment"; (3) the legality of the manner of selecting the jury.

(1) The record recites the presence of the attorney for the United States, the defendant in proper person and by his attorney, and adds that "thereupon the defendant being arraigned upon the indictment pleads thereto not guilty and for trial puts himself upon the country, and the attorney of the United States doth the like."

The contention is that there is a fatal defect in that the record does not show that the indictment was read to the defendant, and to establish that such reading was necessary counsel invoke the Sixth Amendment of the Constitution of the United States, which provides, among other things, that in all criminal prosecutions the accused shall be informed of the nature and cause of the action against him. But to this it may be urged, as it is urged, that information of the charge may be given without reading the indictment. But we may pass that, and grant also that in capital and otherwise infamous crimes both the arraignment and plea are a matter of substance, and must be affirmatively shown by the record. We think that they are shown if such be the fair intendment of the words of the record. And this is demonstrated by the case that is relied on against it, that is, *Crain* v. *United States*, 162 U. S. 625. In that case the record did not show (and we quote from the opinion, p. 636) "that the accused was ever formally arraigned, or that he pleaded to the indictment," except as an inference from a statement in the bill of exceptions that the jury were "sworn and charged to try the issues joined." It was held, after elaborate dis-

cussion, three members of the court dissenting, that a plea to the indictment was not a matter of form, but of substance, and should be shown by the record. In the discussion and in the cases cited the arraignment was considered as distinct from the plea and consisted of formally calling the accused to the bar for the purpose of a trial. We may quote as illustrative the following paragraph from pages 637, 638:

"According to Sir Matthew Hale, the arraignment consists of three parts, one of which, after the prisoner has been called to the bar, and informed of the charge against him, is, the 'demanding of him whether he be guilty or not guilty; and if he pleads not guilty, the clerk joins issue with him *cul. prist*, and enters the prisoner's plea; then he demands how he will be tried, the common answer is, *by God and the country*, and thereupon the clerk enters *po. se*, and prays to God to send him a good deliverance.' 2 Hale's Pl. Cr. 219. So, in Blackstone: 'To arraign is nothing else but to call the person to the bar of the court to answer the matter charged upon him in the indictment.' 'After which [after the indictment is read to the accused] it is to be demanded of him whether he is guilty of the crime whereof he stands indicted, or not guilty.' 4 Bl. Com. 322, 323 to 341. Chitty says: 'The proper mode of stating the arraignment on the record is in this form, "and being brought to the bar here in his own proper person, he is committed to the marshal, etc. And being asked how he will acquit himself of the premises (in case of felony, and of 'the high treasons' in case of treason) above laid to his charge, saith," etc. If this statement be omitted, it seems the record will be erroneous.' 1 Chitty's Cr. Law,* 419."

There is no explicit provision in the laws of the United States describing what shall constitute an arraignment. But so far as it is expressed it has a definite meaning. By § 1032 of the Revised Statutes it is provided that

"when any person indicted for any offense against the United States, whether capital or otherwise, upon his *arraignment* stands mute, or refuses to plead or answer thereto, it shall be the duty of the court to enter the plea of not guilty on his behalf, in the same manner as if he had pleaded not guilty thereto. And when the party pleads not guilty, or such plea is entered as aforesaid, the cause shall be deemed at issue, and shall, without further form or ceremony, be tried by a jury."

It will be observed that the word "arraignment" is used as comprehensively descriptive of what shall precede the plea. If it be so used in the law, it certainly can be used in the record as showing the performance of that which the law prescribes by it. We realize that both the Constitution and the law are careful to direct that information be given to the accused of the charge against him. By § 1033 it is provided that when any person is indicted for any capital offense, if it be treason, three days before the trial, and if it be any other capital offense, two days before the trial, a copy of the indictment and list of jurors and witnesses shall be delivered to him. And this can be insisted on. *Logan* v. *United States*, 144 U. S. 263; *Hickory* v. *United States*, 151 U. S. 303. We may presume that the law was complied with in the present case and that Johnson was given a copy of the indictment as well as having had it read to him, which we think the record sufficiently shows; and as the record imports verity it cannot be contradicted by an affidavit which counsel filed in the case, even if it had been filed for such purpose, which, according to counsel, it was not, but "to call the attention of the court to the defect on the face of the record." *Evans* v. *Stettnisch*, 149 U. S. 605, 607.

(2) Prior to January 15, 1897, homicide, as a crime against the United States was divided into murder and manslaughter "when committed within any fort, arsenal, dock-yard, magazine, or in any other place or district of

country under the exclusive jurisdiction of the United States," and upon the high seas and certain waters out of the jurisdiction of any particular State. The punishment for murder was death; for manslaughter, a certain term of imprisonment. Sections 5339, 5340, 5343. The crime of rape, when committed in any of the specified places, was also punished by death. Section 5345.

By the act passed January 15, 1897, it was provided "that in all cases where the accused is found guilty of the crime of murder or of rape under section fifty-three hundred and thirty-nine or fifty-three hundred and forty-five, Revised Statutes, the jury may qualify their verdict by adding thereto 'without capital punishment'; and whenever the jury shall return a verdict qualified as aforesaid, the person convicted shall be sentenced to imprisonment at hard labor for life." 29 Stat. 487, c. 29. It will be observed that § 5339 of the Revised Statutes is made part of the act. By that section, reënacting earlier acts of Congress, "every person who commits murder" "within any fort, arsenal, dockyard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States, shall suffer death." The act was held applicable to the District of Columbia, and under its provisions and § 5339 until January 1, 1902, the date when the District Code became effective, murder was prosecuted. *Winston* v. *United States*, 172 U. S. 303.

By the District Code murder was divided into two degrees, and it was provided that the punishment for murder in the first degree should be "death by hanging." Punishment for manslaughter was fixed at imprisonment for life, or for not less than twenty years. Sections 798, 799 (this section made it murder in the first degree to put obstructions on a railroad or street railroad), 800 and 801.

The District Code also changed the law as to rape and fixed its punishment at not less than five nor more than thirty years, the jury having the power to add to their

verdict, if it be guilty, the words "with the death penalty." Section 808.

It necessarily followed that the provision for the qualified verdict ceased to apply in the District. Thereafter the definitions and requirements of the District Code prevailed and the death penalty was imposed for conviction of murder in the first degree for eight years.

In the meanwhile a commission was at work revising and codifying the criminal and penal laws of the United States, with the result that a Criminal Code was approved March 4, 1909, 35 Stat. 1088, c. 321. It is the asserted clash between its provisions giving power to the jury to qualify their verdict and those of the District Code under which, we have seen, the jury has not such power, that constitutes the question in this case.

That some provisions of the Criminal Code are applicable to the District, is conceded. It is conceded by the Government that the first ten chapters are applicable just as they are to the States, Territories and other districts, and that the same is true of chapter 12. The concession is put upon the ground that those chapters deal with offenses Federal in their nature. Chapter 13, it is said, relates to territorial jurisdiction and deals with certain offenses "'when committed within any Territory or district, or within or upon any place within the exclusive jurisdiction of the United States.'" So far as the District Code deals with the offenses described in chapter 13, it is superseded by the Criminal Code.

The Government says: "There seems to be no room for doubt of this. The offenses defined are to be punished as prescribed 'when committed within any Territory or district, or within or upon any place within the exclusive jurisdiction of the United States.' Sec. 311. The District of Columbia comes within this description. Then we find in § 319 that 'the provisions of this section shall apply only within the Territories of the United States,' and in

§ 320 that 'the provisions of this section shall apply only within the Territories of the United States and the District of Columbia.'"

The final concession of the Government, therefore, is that "it cannot be said broadly that in the enactment of the Criminal Code there was no purpose to deal with or modify the District Code in any respect." But the Government turns from these concessions and insists that chapter 11, in which murder is defined, was not intended to apply to the District. This is deduced from the report of the commission and § 272 of the chapter which defines the territorial extent and the application of the chapter. The commission in their report said: "In the revision of this chapter we have deemed it important to define with the greatest attainable precision the places within which the jurisdiction of the United States over crimes shall be exercised."

They adopted a definition by an enumeration of places. Among others, the following: "Any fort, arsenal, dockyard, magazine, other needful building, structure, reservation, or other place under the exclusive jurisdiction of the United States."

But the suggested definition was amended by the joint committee of Congress and became § 272 of the Criminal Code, which is less broad than the provision recommended by the commission. That section provides: "The crimes and offenses defined in this chapter [11] shall be punished as herein prescribed. . . . Third. When committed within or on any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof, or any place purchased or otherwise acquired by the United States by consent of the legislature of the State in which the same shall be, for the erection of a fort, magazine, arsenal, dockyard, or other needful building." The difference to be observed between this provision and that recommended by the commission is the

difference between "any fort . . . or other place under the exclusive jurisdiction of the United States," and "any lands reserved or acquired for the exclusive use of the United States, and under the exclusive jurisdiction thereof." The word "lands" in the latter is limited, as the word "place" was in the former, by its association. It is further limited and, indeed, specialized by the qualification "reserved or acquired for the exclusive use of the United States." In other words, it has a proprietary and not a governmental sense, and is very inapt, indeed, to describe the District of Columbia.

This view is reinforced by a comparision of § 272 with §§ 5339 and 5570 of the Revised Statutes, which preceded it, and of which it was intended to take the place. Section 5570 was the predecessor of the fourth subdivision of § 272, and we have no concern with it. The other three subdivisions were preceded by § 5339, which provided as follows: "Every person who commits murder—First. Within any fort, arsenal, dock-yard, magazine, or in any other place or district of country under the exclusive jurisdiction of the United States;

"Second. . . .

"Third. . . . shall suffer death."

It will be observed, therefore, how general and comprehensive the first clause of § 5339 is, and in comparison how restricted and special is subdivision three of § 272. In other words, there is omitted from the latter the words by which, we have seen, it was decided in *Winston* v. *United States*, *supra*, that the act of January 15, 1897, *supra*, which was the first legislation giving the power to a jury to qualify their verdict, was applicable to the District of Columbia.

A change of language is some evidence of a change of purpose, and certainly it could not have been supposed that the words "any lands reserved or acquired for the exclusive use of the United States," used in § 272, would

be regarded as the equivalent in meaning of the words "district of country under the exclusive jurisdiction of the United States," used in § 5339. And yet it is mainly on those words in § 272 that appellant relies. The District of Columbia can hardly be said, as we have pointed out, to be in any proper or adequate sense "lands reserved for the exclusive use of the United States," while the words "district of country under the exclusive jurisdiction of the United States" can be, as they had been, properly and adequately held to include the District of Columbia.

Very little comment is necessary to show the purpose of the restricted language of § 272. Chapter 11 deals, as said by the Government, with offenses of the kind subject to the jurisdiction of the States severally where there are States—offenses not distinctively Federal in character, but subjects of local or domestic police. The Territories provided their own laws in such cases, just as the States did, and there were distinct congressional enactments for Alaska and the District of Columbia which were not intended, we think, to be disturbed. This conclusion gets strength from § 289, which provides that if any act be done or omitted in any of the places mentioned in § 272 which is not made penal by a law of Congress but is penal "within the territorial limits of any State, recognized Territory or District," shall remain penal notwithstanding a "subsequent repeal or amendment thereof by any such State or Territory or District."

It follows, therefore, we think, that chapter 11 of the Criminal Code, and necessarily § 272, which is a part of it, are not applicable to the District of Columbia. And it is an immediate inference that if the chapter defining the crime of murder is not applicable, chapter 14, which deals with its trial and incidents, may not be applicable. There are circumstances which confirm the inference.

In chapter 11 the definition of murder is essentially the same as in the District Code, though there are some

differences in the manner of expression. It is divided into murder in the first degree and murder in the second degree, and in both the punishment is death, the District Code providing the manner of death to be by hanging, as does the Criminal Code, in § 323 of chapter 14.

The punishment for murder in the second degree is different in the different codes. In the District Code it is imprisonment for life or for not less than twenty years; in the Criminal Code, for life or for not less than ten years. The punishments for manslaughter are also different, being for not more than ten years in the Criminal Code and not exceeding fifteen years in the District Code, or such imprisonment and a fine not exceeding one thousand dollars.

This brings us to the consideration of chapter 14, of which it may be said that most of its sections are continuations of the sections of the Revised Statutes or of former acts of Congress. For instance, § 330, which provides for the qualified verdict, is the same as the act of January 15, 1897, c. 29, § 1, 29 Stat. 487, except that the words "murder in the first degree" are added.

Further comparisons of the sections and provisions of the codes will not help us to clarify the situation, which, it must be admitted, lends itself to controversy.

We think, however, that there are certain general considerations which control. The codes are separate instruments, and no certain test can be deduced from pointing out particular likenesses or differences. But the effect of separation is important and necessarily had its purpose. The codes had in the main special spheres of operation and provisions accommodated to such spheres. There is certainly nothing anomalous in punishing the crime of murder differently in different jurisdictions. It is but the application of legislation to conditions. But if it be anomalous, very little argument can be drawn from it to solve the questions in controversy. The difference

existed for a number of years between the District and other places under national jurisdiction, for, as we have seen, the qualified verdict has not existed in the District since the enactment of the District Code, and did not exist when the Criminal Code was enacted. There is certainly nothing in the mere act of enacting that code which declares an intention to give to the provision conferring power on a jury to qualify their verdict greater efficacy against the code of the District than the same provision in the act of January 15, 1897, possessed. And the difference between that act and the District Code we cannot assume was overlooked and all that it meant in the administration of criminal justice when Congress came to review the laws of the country for the purpose of their codification and necessarily the territorial extent of their operation.

Congress certainly in enacting the District Code, recognized the expediency of separate provisions for the District of Columbia. It was said at the bar and not denied that the District Code was not only the work of the lawyers of the District, having in mind the needs of the District, but of its citizens as well, expressed through various organizations and bodies of them. In yielding to the recommendations Congress made no new precedent. It had given local control to the Territories, and it enacted a separate code for Alaska.

But it is said that Congress recognized the incompleteness of the District Code, and provided that all inconsistent acts of Congress passed thereafter should be held to modify its provisions, and to support this § 1639 is cited. That section provides as follows:

"The enactment of this code is not to affect or repeal any act of Congress which may be passed between the date of this act and the date when this act is to go into effect; and all acts of Congress that may be passed hereafter are to have full effect as if passed after the enactment

of this code, and, so far as such acts may vary from or conflict with any provision contained in this code, they are to have effect as subsequent statutes and as repealing any portion of this act inconsistent therewith."

In connection with this section, § 341 of the Criminal Code is referred to, which is as follows:

"Also all other sections and parts of sections of the Revised Statutes and acts and parts of acts of Congress, in so far as embraced within and superseded by this act, are hereby repealed; the remaining portions thereof to be and remain in force with the same effect and to the same extent as if this act had not been passed."

This section adds no force or explanation to § 1639. Of course, what was "embraced within and superseded by" the Criminal Code is repealed by it. But we have to consider, as we have considered, whether the provision of the District Code in regard to the punishment of murder were embraced within the Criminal Code, and the discussion answers as well the contention based on § 1639. There is no inconsistency of superseding or repealing effect between the Code of the District and the Criminal Code, regarding the latter as an act of Congress passed after the District Code. Having definite territorial operation, they can exist together. And, as said by the Court of Appeals, a cogent reason for the conclusion that they were intended to exist together is found in the repealing provisions of the Criminal Code, which, in chapter 15, enumerates in detail the provisions repealed, and no reference is made to the District Code.

(3) The last contention of petitioner is that the jury was not lawfully drawn. This contention is made as a make-weight at the last minute. It was not made as a ground for new trial or arrest of judgment, nor was it assigned as error in the Court of Appeals. The contention has the broad basis, according to the argument of petitioner, that there is no way of impaneling jurors in a

capital case in the District of Columbia without assenting to or dissenting from the proposition. We think it constituted a ground of objection to the competency of the jurors when they were called, and should have been availed of at the trial. It is provided by § 919 of the District Code that no verdict shall be set aside for any cause which might be alleged as ground of challenge before a juror is sworn, except for disqualifying bias not discovered or suspected by the defendant or his counsel before the juror was sworn.

Judgment affirmed.